
How court-connection and lawyers' perspectives have shaped court-connected mediation practice in the Supreme Court of Tasmania

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This thesis is dedicated to my family: Drew, Ruby and Daschel.

Declaration

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Parts of this thesis were published or submitted for publication in journals during candidature. These were as follows:

- Rundle, Olivia, 'Barking Dogs: Lawyer attitudes toward direct disputant participation in court-connected mediation of general civil cases' (2008) 8(1) *QUTLJJ* 77.
- Rundle, Olivia, 'The purpose of court-connected mediation from the legal perspective' (2007) 10(2) *ADR Bulletin* 28.
- Rundle, Olivia, 'Evaluating Dispute Resolution' (2005) *Law Letter* 10.

Signed

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This thesis states the law as at 1st November 2009.

Abstract

This thesis analyses the shaping of mediation within the court-connected context. It answers three questions:

1. What is possible within court-connected mediation?
2. What is happening within the Supreme Court of Tasmania's mediation programme?
3. Why is there a difference between the possibilities and the practice of court-connected mediation in Tasmania?

The potential scope, purposes and practices of court-connected mediation are identified through an examination of mediation theory and particular issues that arise within the context of the formal justice system. All theoretical and practice models of mediation promote a degree of mediation's core features of responsiveness to the individual disputants, self-determination and cooperation. These features of mediation are realised when some key opportunities are extended to disputants within the mediation process. The opportunities are: to explore individual disputants' interests and preferences regarding the content of discussions, for disputants to participate directly during the mediation process and to work cooperatively to respond to the conflict. It is concluded that there is no reason why mediation cannot deliver these key opportunities within the context of the litigation system. Court-connected mediation has broad potential and may promote a variety of purposes and incorporate a range of practices.

This thesis presents a case study of court-connected mediation practice in the Supreme Court of Tasmania ('the Court') to compare the possibilities of court-connected mediation with the reality of practice. There are no explicit constraints in the Court's mediation programme. A broad definition of mediation applies, there are no clear statements about the purpose for which mediation has been introduced into the litigation process and there are no restrictions on the kinds of mediation that may be practised. Despite this broad potential, it is concluded that mediation within the Court's programme tends to have a narrow legal scope, where non-legal concerns are largely ignored, lawyers rather than disputants are the main participants and competitive approaches are sometimes adopted within the programme.

The explanation for the differences between the theoretical potential of court-connected mediation and the reality of its practice in Tasmania is based upon the influences of the connection with the formal civil justice system, court-connected mediator's practices and the ways that lawyers approach mediation. The qualitative analysis of interviews with lawyers and mediators reveals how these participants approach court-connected mediation, their perceptions of its scope and purpose and insight into some of the dynamics of lawyer-client relationships.

This thesis concludes by considering whether there are implications for the Court, lawyers, disputants, mediation theorists and court-connected mediation generally. Some recommendations are made in response to the research findings.

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Chapter 1

Introduction

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1 Aim

This thesis analyses the shaping of mediation within the court-connected context. It answers three questions:

1. What is possible within court-connected mediation?
2. What is happening within the Supreme Court of Tasmania's mediation programme?
3. Why is there a difference between the possibilities and the practice of court-connected mediation in Tasmania?

First, the potential scope, purposes and practices of court-connected mediation are identified through an examination of mediation theory and particular issues that arise within the context of the formal justice system. Secondly, this thesis presents a case study of court-connected mediation practice in the Supreme Court of Tasmania ('the Court'). Thirdly, it offers an explanation for the differences between the theoretical potential of court-connected mediation and the reality of its practice in Tasmania.

The practices and approaches of lawyers and mediators within the programme are the primary focus of the explanation. This thesis concludes by considering whether there are implications for the Court, lawyers, disputants, mediation theorists and court-connected mediation generally.

The primary data that address the research aim are in-depth interviews with lawyers and mediators who work within the Court's programme.¹ The qualitative analysis of those interviews reveals how lawyers and mediators approach court-connected mediation, their perceptions of its scope and purpose and insight into some of the dynamics of lawyer-client relationships. Some quantitative data from the Court (for example, mediation dates and settlement timing) are utilised to provide a detailed description of the programme.

The mediation field is broad and encompasses a range of models and purposes for which mediation may be used by individuals and institutions.² All theoretical and practice models of mediation promote to some degree three core features: responsiveness to the individual disputants' needs in relation to content and process,

¹ Chapter 3 outlines the empirical research method in detail.

² Chapter 2 [3] examines the diversity within the mediation field.

self-determination and cooperation.³ In other words, mediation has the flexibility to be shaped according to the individual interests and preferences of the disputants, at least to some extent. It is also a process that facilitates decision-making by disputants. Mediation also relies upon a degree of cooperation between participants. These core features of mediation are realised when some key opportunities are extended to disputants within the mediation process. The opportunities are: to explore individual disputants' interests and preferences regarding the content of discussions, for disputants to participate directly during the mediation process and to work cooperatively to respond to the conflict. Disputants may choose to forego any of these opportunities; however, almost all theories accept that it is important that they are invited to make an informed choice as to whether or not to embrace the opportunities, otherwise mediation departs from its fundamentally disputant-centred nature.⁴

The approaches of all participants in the mediation process may extend or restrict the potential benefits of mediation to disputants. This thesis considers the impact of mediators' and lawyers' behaviours on the degree to which the key opportunities have been realised.

There is potential for the key opportunities to be extended to disputants who participate in court-connected mediation. Within the court context there are generally no legislative or policy constraints on the way that mediation is practised.⁵ Generic definitions of 'mediation' are often applied to court-connected mediation, the

³ Chapter 2 [4] establishes the core features of mediation as a touchstone for the examination of court-connected mediation in the Supreme Court of Tasmania.

⁴ Chapter 2 [2] discusses the historical context of the mediation field, including the individualist values that stimulated the development of the modern mediation field.

⁵ Chapter 2 [3.1.2] considers the broad definitions that are preferred in court-connected mediation.

purpose or limitations of court-connected programmes are rarely defined explicitly and a range of practices have been observed within the court-connected setting.⁶ When there is a broad legislative and policy framework, there is no reason why different theoretical models of mediation could not fit within a court-connected context. Court-connected mediation practice is not necessarily limited to particular mediation models. There is scope for a range of purposes and practices to be adopted according to the wishes of the disputants.

There are no explicit constraints in the Supreme Court of Tasmania's mediation programme. A broad definition of mediation applies, there are no clear statements about the purpose for which mediation has been introduced into the litigation process and there are no restrictions on the kinds of mediation that may be practised.

Despite the fact that there are no explicit limitations placed upon court-connected mediation, in practice there appears to be a focus on settling based upon a discussion of the legal issues. This limited scope and practice of court-connected mediation has been confirmed consistently in empirical research.⁷ Here, it is hypothesised that when mediation is practised in the Supreme Court of Tasmania:

1. Non-legal interests tend to be ignored;
2. Lawyers rather than disputants are the main participants; and
3. There is a tendency for competitive approaches to be adopted.

⁶ See Chapters 2 and 4; Nadja Alexander, 'Mediation on trial: ten verdicts on court-related ADR' (2004) 22(1) *Law in Context* 8, 17; Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 17, 113; Kathy Mack, 'Court Referral to ADR: Criteria and Research' (National ADR Advisory Council and Australian Institute of Judicial Administration, 2003) [5.3]; Tania Sourdin, *Alternative Dispute Resolution* (2nd ed, 2005) [6.260].

⁷ See Chapter 2 [2.4], [3.3.5].

The hypotheses predict that in court-connected mediation there is a departure from the key opportunities of mediation that were identified above and are discussed in detail in Chapter 2.

This thesis also offers an explanation as to why court-connected mediation has particular characteristics. The influences of the connection with the formal civil justice system, court-connected mediators' practices and the ways that lawyers approach mediation are considered.

It is argued that in court-connected mediation, the potential scope of mediation is affected partly by the dilemma of court-connection.⁸ This dilemma is that when courts sanction mediation processes, they face the following tensions:

- Whether the court has an obligation to ensure the fairness of a private, consensual process conducted under its supervision.
- Whether court-connected mediated outcomes should comply with the law.
- How much courts (and mediators) should interfere in lawyer-client relationships and lawyers' promotion of their clients' interests and management of their legal cases, by encouraging direct disputant participation.

The private and consensual nature of the mediation process impedes courts' ability to monitor mediation in the way that they can monitor other litigation processes. Formal rules of procedural fairness and the doctrine of precedent equip courts to monitor the trial process. These formal standards are difficult to monitor in mediation, largely because it is a private process. A record of trial proceedings is kept and can be

⁸ Chapter 2 [2.5] continues the discussion of the dilemma of court-connected mediation.

examined if allegations of unfairness in process or outcome are raised. Records of mediation proceedings are confidential and generally inadmissible.

Furthermore, when mediation takes place in connection with the formal litigation system, the direct participation of disputants is an unusual practice within that system. The conventions of legal representation are that lawyers speak on behalf of their clients, often negotiating without their clients being present. In formal trial processes, lawyers carefully manage the communications that occur and manage the legal case. Clients only participate directly by giving evidence in the witness box and giving instructions to their lawyer in private.

There is also tension between the cooperative opportunity of mediation and the context of a primarily adversary litigation system. This tension impacts upon the way that participants, including mediators and lawyers, approach mediation in the context of litigation.

Lawyers and mediators are officers of the Court and therefore share some responsibility for responding to the dilemma of court-connection. This thesis examines the ways that the Supreme Court of Tasmania, mediators and lawyers who practise within the mediation programme have responded to the tensions arising from connection with the litigation system.

The way that lawyers understand the mediation process also impacts upon the nature of court-connected mediation. Lawyers' perspectives of the potential opportunities that may be realised through mediation processes are affected by their awareness of

the range of practices within the mediation field and their understandings of the purposes of court-connected mediation. This thesis provides detailed insight into the perspectives and approaches of lawyers to mediation in the Supreme Court of Tasmania.

2 Scope

This thesis is concerned with the practice of court-connected mediation, not mediation practice in general. It is based upon data from one court-connected mediation programme and its findings are therefore most relevant to the Supreme Court of Tasmania and the lawyers who practise within it. The qualitative analysis does not support generalisation of the statements made by interviewees in this research to lawyers in a broader context. This research nonetheless contributes to the growing body of evidence about lawyers' practices and perspectives of court-connected mediation processes. Trends and themes are identified and compared to the findings in other court-connected contexts.

The research focuses on general civil disputes. The types of matters that are mediated in the Supreme Court of Tasmania's programme are mixed general civil cases and therefore caution should be exercised when drawing comparisons with mediation practice in specialist courts. For example, the nature of mediation practice in the Family Court of Australia would be expected to differ markedly from the nature of mediation practice in personal injuries or commercial disputes, which make up the bulk of the Supreme Court of Tasmania's case load.⁹

⁹ See Chapter 4 for detailed discussion of case characteristics of the Supreme Court of Tasmania.

The practices and perceptions of lawyers who participate in the mediation programme are the main focus of this thesis. The practices and perceptions of mediators are also considered. The other group of participants in court-connected mediation are disputants, whose perspectives fall outside the scope of this research.¹⁰

This thesis is not an evaluation of the effectiveness of the mediation programme at the Supreme Court of Tasmania. It therefore does not seek to draw any conclusions about whether or not the mediation programme is ‘successful.’ The success of mediation is difficult to determine and depends upon the perspective from which the programme is evaluated. In any event, the institutional objectives of the Court’s mediation programme have not been clearly defined by the Court. The quality of the mediation programme cannot be determined in the absence of clearly defined objectives.¹¹ One of the consequences of a lack of clear institutional objectives is a diversity of participants’ expectations. The diversity of lawyers’ and mediators’ expectations of the mediation programme is demonstrated in this thesis.

Whether or not disputants are satisfied with the way that court-connected mediation is practised within the Court is not considered here. Disputants’ perceptions about mediation would address the question of whether it matters to disputants that court-connected mediation differs from the potential of mediation in other contexts. However, that question is not posed by this research. One of the reasons for not

¹⁰ Disputant experiences and perceptions are outside the scope of this thesis and do not directly address the research questions. See Appendix A for a description of early and unsuccessful attempts to collect data from disputants about the Supreme Court of Tasmania’s mediation programme.

¹¹ Hilary Astor, *Quality in Court Connected Mediation Programs : An Issues Paper* (2001) 2.

addressing that question is that attempts to identify disputants' views were unsuccessful.¹²

This study does not seek to evaluate the performance of either the mediators or lawyers who practise within the Court's mediation programme. In relation to the nature and outcomes of the programme, the roles of participants and the style of mediation practice, it is not asserted that there are 'right' and 'wrong' approaches. However, the approaches that are adopted shape the scope, potential and nature of court-connected mediation. This thesis investigates what is happening in the court-connected mediation programme and asks whether that is the optimum that could be achieved, in terms of the full potential of mediation within the litigation context.

3 Significance

The nature of mediation practice in courts is under-researched.¹³ There is insufficient evidence of both the way that court-connected mediation is practised and the way that lawyers perceive court-connected mediation. This thesis provides empirical evidence that addresses both of these deficiencies. It is the first examination of the

¹² Numerous invitations were made to secure disputant participation in the research between February 2005 and June 2006. Only ten disputants participated. Plans to include the disputant perspective in the research were subsequently abandoned. Appendix A contains details of the original research method, the inadequate participation rates and the subsequent redesign of the research.

¹³ Laurence Boulle, 'Extending the courts' shadow over ADR' (2001) 3(10) *ADR Bulletin* 117, 118; Melissa Conley Tyler and Jackie Bornstein, 'Court referral to ADR: Lessons from an intervention order mediation pilot' (2006) 16 *Journal of Judicial Administration* 48, 49; Astor (2001), above n11; Mack (2003), above n6; Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002). Published empirical research regarding Australian court-connected mediation programmes includes: Carol Bartlett, 'Mediation in the Spring Offensive 1992' (1993) 67(4) *Law Institute Journal* 232; Chinkin & Dewdney, 'Settlement Week in New South Wales: An Evaluation' (1992) 3 *Australian Dispute Resolution Journal* 93; Tyler & Bornstein (above); Marie Delaney and Ted Wright, *Plaintiff's Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation* (1997); Tania Sourdin and Tania Matruglio, 'Evaluating Mediation - New South Wales Settlement Scheme 2002' (La Trobe University and University of Western Sydney, 2004); Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (Victorian Department of Justice, 2009).

way that mediation is practised in the Supreme Court of Tasmania and of the way that Tasmanian lawyers approach and perceive court-connected mediation in general civil disputes. This research therefore contributes a unique and significant insight into lawyers' perspectives of court-connected mediation in Tasmania.

The qualitative analysis in this research is based upon in depth interviews of lawyers (42) and mediators (4). It is the largest Australian study to date based upon in-depth interviews of lawyers about their practices and perspectives of mediation.¹⁴ The richness of the qualitative data complements quantitative survey-based research about lawyers' perspectives of mediation.¹⁵ This research also complements research based upon in depth interviews of plaintiffs involved in court processes, by providing the perspectives of lawyers.¹⁶ The present research contributes a unique insight into Australian lawyers' perspectives and practices in court-connected mediation, which is compared and contrasted with research about international lawyers' perspectives of mediation, about which there has been more research conducted.¹⁷

¹⁴ Existing Australian research includes: Sourdin (2009), above n13 (included five in depth interviews with lawyers); Joel Gerschman, 'Pilot Study Examines Lawyer's Roles in VCAT Mediations' (2003) 7 *VCAT Mediation Newsletter* 7 (ten in depth interviews with lawyers).

¹⁵ For example: Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92_text.html>; Rachael Field, 'The Use of Litigation and Mediation for the Resolution of Custody and Access Disputes: A Survey of Queensland Family Law Solicitors' (1996) 7 *Alternative Dispute Resolution Journal* 5; Nadja M Spegel, 'Queensland Lawyer Attitudes Towards Mediation - Implications for Training and Education' (1998) *National Law Review* 1 <www.lexisnexis.com.au/nlr/articles-files/mediate/article.pdf>; Archie Zariski, 'Lawyers and Dispute Resolution : What Do They Think and Know (And Think They Know)? - Finding Out Through Survey Research' (1997) 4(2) *Murdoch University Electronic Journal of Law* 1 <<http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html> (27 May 2004)>; Sourdin (2009), above n13.

¹⁶ Delaney and Wright (1997), above n13.

¹⁷ For example: Bobbi McAdoo and Art Hinshaw, 'The Challenge of Institutionalising Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri' (2002) 67 *Missouri Law Review* 473; Bobbi McAdoo, 'A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota' (2002) 25 (3) *Hamline Law Review* 401; K Saville-Smith and R Fraser, 'Alternative Dispute Resolution: General Civil Cases' (Ministry of Justice, 2004); Macfarlane (2002), above n11; Julie Macfarlane and Michaela Keet, 'Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons

It is generally recognised that court-connected mediation tends to be very lawyer-driven.¹⁸ It has been suggested that legal culture contributes to the legalistic nature of court-connected mediation.¹⁹ However, there is a dearth of empirical research addressing the influence of lawyers in mediation. This thesis provides empirical evidence of the shaping of court-connected mediation by lawyers, provides a better understanding about how legal perspectives impact on the practice of court-connected mediation and the implications of this for the civil justice system and the mediation field. It will therefore contribute to the debate about whether lawyers tend to act in a way that impacts on the potential of mediation, and if so, why they do so.²⁰ Particular approaches to mediation by lawyers may be explained by developing a better understanding of factors that influence their perspectives of court-connected mediation.

from a Maturing Program' (2005) 42 (3) *Alberta Law Review* 677; Professor Dame Hazel Genn, Professor Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Grey, Dev Vencappa, 'Twisting arms: court referred and court linked mediation under judicial pressure' (Faculty of Laws, University College London, University of Nottingham Business School, 2007); Craig A. McEwen, Nancy H. Rogers and Richard J. Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 *Minnesota Law Review* 1317; Craig A. McEwen, Lynn Mather and Richard J. Maiman, 'Lawyers, Mediation, and the Management of Divorce Practice' (1994) 28(1) *Law & Society Review* 149; Stevens H Clarke, Elizabeth D Ellen and Kelly McCormick, 'Court Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects' (North Carolina Administrative Office of the Courts, 1995); Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009).

¹⁸ Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "the Law of ADR"' (1991) 19 *Florida State University Law Review* 1.

¹⁹ Michelle Lebaron and Zena D Zumeta, 'Windows on Diversity: Lawyers, Culture, and Mediation Practice' (2003) 20(4) *Conflict Resolution Quarterly* 463; Ronald J Gilson and Robert H Mnookin, 'Disputing Through Agents : Cooperation and Conflict Between Lawyers in Litigation' (1994) 94 *Columbia Law Review* 509; Julie MacFarlane, 'Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) *University of Missouri Journal of Dispute Resolution* 244; Menkel-Meadow (1991), above n17.

²⁰ See Menkel-Meadow (1991), above n17; Gilson & Mnookin (1994), above n19; Australian Law Reform Commission, 'Issues Paper 25: ADR - It's role in federal dispute resolution' (IP25, ALRC, 1998); Tania Sourdin, 'Facilitative Judging' (2004) 22(1) *Law in Context* 64, 67-68.

Mack argues that there is a need for research into mediation programmes on the basis of an understanding of local context.²¹ Therefore, the case study of the mediation programme at the Supreme Court of Tasmania is detailed. The description of the programme provides important contextual information. It is recognised that there are limitations to the application of research findings between different court-connected mediation programmes.²² However, where programme characteristics are clearly defined, some qualified conclusions may be drawn about similar programmes operating in other locations.²³

4 Thesis structure

Chapter 2 addresses the first of the research questions outlined on page 1: to identify the possibilities in court-connected mediation in terms of purpose, scope and practice. Mediation theory and the dilemma of court-connected mediation (introduced in [1] above) are examined. First, the historic context of the modern mediation field, mediation in Australia and in courts is examined. Then the complexity and diversity of mediation theory and practice is explored. The application of a range of mediation purposes and practices to the court-connected context is considered. It is concluded that any of the theoretical purposes or practice models could be applied in court-connected mediation. Core features of mediation are then identified and it is concluded that each of these features is universal within the mediation field and that a degree of each is expected in every mediation process. The impact of the connection of mediation with the litigation system on each of the core features is considered. The key opportunities linked to each of the core features

²¹ Mack (2003), above n6, 2 and 8.

²² Astor (2001), above n11, 40.

²³ Astor (2001), above n11, 40.

are identified and form the theoretical construct upon which the examination of the Supreme Court of Tasmania's mediation programme is built, through a testing of the hypotheses.

The research method adopted in respect of the empirical component of this research is described in Chapter 3. That empirical evidence is presented throughout the following two chapters of the thesis.

Chapter 4 addresses the second research question from a broad perspective, providing a detailed case study of how mediation is practised in the Supreme Court of Tasmania. The Court is introduced, the evolution of its mediation programme is considered and the nature of mediation practice at the Court is described. The description of the programme is detailed to enable appropriate qualifications to be made if comparisons are drawn with other mediation programmes in the future. The detailed description also contextualises the lawyers' interview responses that are analysed in Chapter 5.

Chapter 5 provides more specific detail about the way mediation is practised at the Court and thereby concludes the consideration of the second research question. It examines lawyers' perspectives and practices in relation to mediation at the Court. This completes the description of the way the Court and lawyers practising within it have responded to the dilemma of court-connection and the degree to which the key opportunities of mediation have been realised. The way that lawyers consider dispute resolution in their general practice, the way that they prepare themselves and their clients for mediation and the expectations that they have about the roles of

participants in mediation are described. Lawyers' perspectives of the goals of court-connected mediation are then considered. In addition to completing the description of court-connected mediation practice in the Supreme Court of Tasmania, this chapter presents the empirical evidence of lawyers' practices and perspectives of the purpose of court-connected mediation, which contributes to the explanation in Chapter 6.

Chapter 6 synthesises the preceding chapters and explicitly addresses the third research question, which is to provide an explanation for the difference between the potential and actual nature of court-connected mediation in Tasmania. It contains the discussion of the key research findings and presents the overall conclusions of the research. Findings are presented about the ways in which the Court and lawyers have responded to the dilemma of court-connection and about the three hypotheses. It is concluded that the Court has relied largely upon the lawyers who practise within its mediation programme to ensure that the mediation process is fair, to apply the law to disputes and to determine the degree of direct disputant participation.

This research also concludes that although there is a tendency for mediation at the Court to have a narrow legal focus, there are some cases where a broader range of issues are discussed. Mediators are able to respond to the individual preferences of the disputants in relation to process and content. They actively support direct disputant participation in private sessions and are supportive of direct disputant participation in joint mediation sessions. However, mediators tend to take a 'hands off' approach to many decisions about process and content, leaving it primarily to lawyers to shape the mediation process and outcomes. The findings demonstrate that lawyers actively narrow the scope of mediation, perceive its primary purpose to be

the efficient resolution of legal issues and generally prefer to act as spokespersons for their clients. Lawyers, through their interactions with their clients and their approaches to the mediation process, limit the capacity for court-connected mediation to realise the key opportunities of mediation.

Chapter 6 considers the implications of these research findings and recommends a number of responses by the Supreme Court of Tasmania, including its mediators. This thesis also makes some important observations that can be applied to a broader context. The findings about lawyers' perspectives of court-connected mediation support a recommendation for broader awareness of mediation's potential within the legal profession. The impact of the lack of clarity of purpose, scope and processes within the Court's programme emphasises the importance of such clarity in all court-connected mediation programmes. Finally, it is concluded that there is no need for a response from mediation theorists to the findings of this research.

Chapter 2

Mediation Theory and the Dilemma of Court-Connected Mediation

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1 Introduction

This chapter establishes the theoretical foundations upon which the rest of the thesis is built. It contributes to the research aim of analysing court-connected mediation by providing a theoretical frame of reference against which to conduct the observation of mediation practice in the Supreme Court of Tasmania ('the Court'). It addresses the first research question by identifying the possibilities in court-connected mediation. The potential of court connected mediation practice is described with reference to two matters: first, core features that are identified as being common to the mediation field and, second the dilemma of court-connection. This approach is justified on two grounds. First, there is significant diversity in the mediation field and a lack of theoretical or, in Tasmania, legislated constraints upon the type of mediation process that should or can be adopted in the court context. This suggests that features identified as common to all theories and models of mediation will provide the most suitable touchstone and framework for an analysis of court-connected mediation. Secondly, while there may be no theoretical constraints upon the nature of court-connected mediation, there are constraints that arise from its court context. It is suggested that the nature of court-connected mediation is limited by court-related factors. This is the dilemma of court-connection. This thesis examines

how one programme, and the lawyers in it, have responded to that dilemma and it measures the consequent impact on the potential of mediation in that programme.

The particular issues that arise when mediation is connected with courts are considered throughout this chapter. The tensions that arise when mediation is conducted within the context of the formal legal system reflect distinctions between the way that the formal legal system resolves disputes and the alternative approaches to dispute resolution that are embedded in the mediation field. Some tensions arise from the court's obligations as the public institution of justice compared with the private ordering that may occur in mediation.¹ Other tensions arise from uncertainty about the appropriate roles of lawyers and their clients in court-connected mediation. The dilemma of court-connection presents inevitable challenges for mediation within the legal system and must be resolved in some way.

The historic context of court-connected mediation is considered in part 2 for a variety of introductory purposes. The modern mediation field emerged as an alternative to the formal justice system. This highlights the contrasts between mediation and court processes. A variety of developments in mediation practice are considered. This introduces the diversity of the mediation field which is examined in part 3. Attention then turns to the historic development of mediation in Australia, including the Australian civil justice system. This provides background to the specific context of this thesis, being an Australian court. Part 2 considers the ways that mediation and courts have interacted since court-connected mediation has been introduced. The influence of each on the other is acknowledged. This sets the scene for the

¹ Melvin Aron Eisenberg, 'Private ordering through negotiation: Dispute-settlement and rulemaking' (1976) 89 (4) *Harvard Law Review* 637.

investigation throughout the remainder of the chapter of the dilemma of court-connection, which is discussed at the conclusion of part 2.

In part 3, the diversity of the mediation field is examined in detail. The mediation field incorporates a broad range of processes, both in terms of theoretical conceptions of mediation and practice. The breadth of the field is considered to determine whether or not it is appropriate to restrict expectations about court-connected mediation to particular theories or models. The examination of this diversity yields core features common to all theoretical approaches and models. The diversity of the mediation field explains why the common features identified here and elaborated in part 4 are present in varying degrees in different contexts, ideologies and practices. This begs consideration of the extent to which different ideologies, practice models and purposes might be promoted in the court-connected context. Consideration of this matter contributes to the justification for the hypotheses to be tested in the examination of court-connected mediation in the Supreme Court of Tasmania. Court-connected mediation generally operates within a context of broad definition and non-restrictive guidelines. This is true for the Supreme Court of Tasmania. It is concluded that it is inappropriate to restrict expectations about court-connected mediation practice to particular theories or practices of mediation, as there is an opportunity for any of them to be promoted in the court-connected context.

In part 4, core features of mediation that are common within the diversity of the field are identified and examined. These are: responsiveness to the individual disputants, self-determination and cooperation. The extent to which each of these core features is apparent in different theories, practices and the court-connected content is

considered. It is concluded that each of the core features are fundamental to the mediation field and can be expected to be found to some degree in every mediation process. Some key indicators of each of these features are identified, in relation to the process and content of mediation. The applicability of the core features in the court-connected context is discussed. It is concluded that although there are some factors that diminish the promotion of responsiveness, self-determination and cooperation in the court-connected mediation context, each of the core features may still be observed in court-connected mediation. This supports the validity of the approach adopted in this thesis: to measure the observations of court-connected mediation practice against indicators of responsiveness, self-determination and cooperation. The indicators of the core features that provide the measures used in this thesis are explained in chapter 3.

This chapter justifies the hypotheses tested in this thesis. The hypotheses are built on recognition of the inherent diversity in the mediation field, the common core features within that diversity and the consequences of court-connection. Examination of the historic context of court-connected mediation, the diversity in the mediation field and core common features of mediation builds the foundation for the hypotheses.

2 Historic and contextual background

Here, the history of mediation as an alternative to formal justice systems, the multiple directions in which mediation has grown, the use of mediation in Australia and the interaction between mediation and courts is discussed. This introduces the diversity of the mediation field, the foundations on which the field is grounded and issues particular to court-connected mediation.

Intervention in disputes by a third party has always been a common method of conflict management and has been practised in diverse communities and circumstances.² Modern understandings of mediation reflect contemporary values of individualism,³ self-determination⁴ and consensus,⁵ values which became prominent in Australia during the 1960s and early 1970s.⁶ These values contrast with the importance in the formal legal system of universal application of legal standards, determination by a third party decision-maker and competition between perspectives rather than cooperation. The contrasting underlying values of the mediation field and the formal legal system create the dilemma of court-connection that is presented when mediation is conducted within the legal system.

The history of the modern dispute resolution field demonstrates that mediation gained prominence as an alternative to formal legal processes and is laden with values that may conflict with the values of the adversary justice system. The development of mediation as an alternative is of particular relevance when examining mediation within the context of the court system. The way that the mediation field has developed in Australia is considered, particularly trends in court-

² Peter Condliffe, *Conflict Management: A Practical Guide* (3rd ed, 2008); Tania Sourdin, *Alternative Dispute Resolution* (2nd ed, 2005) 4-8; Peter Condliffe, 'A Short History of Alternative Dispute Resolution in Australia: 1975-2000' (2000) 19(2) *The Arbitrator* <<http://www.iama.org.au/journal/jn200011/condliffe01.htm>> 9.

³ 'individualism - The social theory which advocates the free and independent action of the individual, as opposed to communistic methods of organisation and state inference.' *Oxford English Dictionary Online* (2000) Oxford University Press <<http://dictionary.oed.com>> at 5th December 2007.

⁴ 'self-determination - Determination of one's mind or will by itself towards an object.' *Oxford English Dictionary Online* (2000) Oxford University Press <<http://dictionary.oed.com>> at 5th December 2007.

⁵ 'consensus - Agreement in opinion; the collective unanimous opinion of a number of persons.' *Oxford English Dictionary Online* (2000) Oxford University Press <<http://dictionary.oed.com>> at 5th December 2007.

⁶ Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 59.

connected programmes. This part concludes by considering some of the ways that courts and mediation have interacted within the court-connected context.

2.1 Mediation as an alternative

The modern dispute resolution field, of which mediation is a part, emerged from dissatisfaction with existing processes, promises about what new approaches offered and changed attitudes towards conflict.⁷ New approaches to dispute resolution arose from dissatisfaction with dominant paradigms and practices of negotiation and conflict resolution. These included: the adversarial nature of the justice system, competitive approaches to dispute resolution and determination by third parties rather than participatory decision-making. Dissatisfaction with existing conflict resolution paradigms and practices emerged in the context of rapid social change that challenged existing hierarchies, prioritised individual freedom over state control and promoted peace.⁸

Theorists and practitioners of dispute resolution started developing alternative ideas about ‘how people might more effectively interact to solve problems.’⁹ Advocates of new approaches to dispute resolution maintain a conviction that a cooperative problem-solving approach to dispute resolution is preferable to an adversarial positional approach.¹⁰

⁷ Condliffe (2008), above n2, Chapter 4; Carrie Menkel-Meadow, 'Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections' (2006) *Negotiation Journal* 485.

⁸ Influences on rapid social change in the 1960s and 1970s include: Australia and the USA's involvement in war in Vietnam and vocal opposition to that involvement, the feminist movement's impact on gender equality, patterns of work and family relationships, technological changes that facilitated more rapid and widespread dissemination of information and ideas and the impact on society of the coming of age of the baby boomer generation.

⁹ Menkel-Meadow (2006), above n7, 490.

¹⁰ The problem-solving approach is described below at [2.2]. For examples of advocates of modern dispute resolution approaches see: Accord Mediation, *Mediation is better than Litigation* <www.accordmediation.com.au/lookingup.swf> at 3 July 2007; Richard Acello, *The mediation*

The adversarial, positional approach to dispute resolution is a defining feature of the adversary justice system. In that system, parties compete to have their own position accepted as the ‘truth’ by the third party decision-maker. Conflict is resolved through competition, from which there emerges a ‘winner’ and a ‘loser’.

Mediation is said to provide an opportunity to treat conflict as a positive learning experience, to celebrate diversity, to prioritise cooperation over competition and to resolve the underlying issues that have contributed to the conflict.¹¹ Such claims present mediation as a process that overcomes the inadequacies of traditional approaches to dispute resolution. Mediation is presented as an educative, inclusive and cooperative process that promotes peace. Its potential includes the achievement of longer lasting resolutions and social change.

The dispute resolution field is founded on recognition that conflict is an inevitable consequence of living in a human community and it should not be feared, avoided or unexpected. Theories have developed which assume the inevitability of conflict and propose means of managing that conflict in a constructive, peaceful way. Therefore, to be in conflict is not perceived to be a sign that a relationship has failed, but is an opportunity to manage difference. Such theoretical notions are contradicted in the philosophy of the traditional legal system which tends to assume that there is only

exit ramp: How to avoid the congested, slow-moving and costly price of litigation (2006) San Diego Metropolitan <www.sandiegometro.com/2006/mar/mediation.php> at 3 July 2007; William Donahue, *Divorce mediation - it's time for a revolution* Transitions Mediation Center <www.itsmydivorce.com/pg6.cfm> at 3 July 2007; Martin S Harris and Benjamin Richards, *Construction dispute mediation* (2003) <www.constructiondisputemediation.com> at 3 July 2007; Los Angeles County Mediation Center, *Mediate don't litigate* (2007) <www.lacountymediations.com> at 3 July 2007.

¹¹ Kenneth Cloke, *The Culture of Mediation: Settlement vs Resolution* (2005) Beyond Intractability.org <www.beyondintractability.org> at 26th July 2006.

one truth and that if one understanding of a situation is right, then alternative understandings are wrong. This is a positivist approach that produces binary outcomes. By contrast, dispute resolution tends to emphasise diversity and may encourage imaginative outcomes that side-step the issue of blame.

The distinction between the privacy of mediation and the public nature of the formal justice system is another example of mediation as an alternative. The private, confidential and privileged qualities of mediation are fundamental features of the process.¹² These qualities contrast with the open, accessible and public nature of court proceedings. However, they are qualities that mediation shares with the process of lawyer negotiation, which is a traditional means of resolving litigated disputes. The benefits of confidentiality include: the ability to avoid public scrutiny, the creation of a 'safe' environment in which open and free communication is enabled and the protection from exposure of the terms of settlement to the public. Mediation provides an opportunity to enjoy the benefits of confidentiality that are present in informal negotiations with the added potential benefits of a mediator facilitating the process. In this sense, mediation offers an alternative to unassisted negotiations.

Mediation is a dispute resolution process that offers an alternative to other processes, including the enforcement of rights by a judge, negotiation between lawyers on their clients' behalf and direct negotiation between the parties. The ways in which mediation can be distinguished from alternative processes varies according to the way mediation is practised.

¹² Boulle (2005), above n6, 539.

2.2 Emergence of varying approaches to mediation

One of the defining features of mediation is the variety inherent within it. Mediation is flexible and adaptable so that its effectiveness can be maximised. The measures of effectiveness vary between the purposes of mediation, which are also diverse.

Mediation may be interest-based, focus on relationships or have a pre-occupation with settlement.

The modern dispute resolution field emerged from a variety of disciplines including law, psychology, sociology, politics and economics.¹³ Theorists in a multitude of disciplines acknowledged problems with traditional approaches to conflict and developed new ideas within their own disciplines. Dispute resolution continues to be multidisciplinary in nature, with theoretical developments made within the social science, economic, management, legal and community disciplines. The field therefore incorporates a diversity of approaches and perspectives, contributing to the multiple directions in which mediation has grown over time.

At the heart of the emergence of the modern dispute resolution movement were developments in negotiation theory which applied problem-solving approaches to negotiations between disputants. One of the pivotal texts that contributed to the rapid dissemination of problem-solving theory was Fisher and Ury's *Getting to Yes: Negotiating Agreement Without Giving In* ('*Getting to Yes*'), first published in 1981.¹⁴ This text proposed a way to conduct negotiations other than in the traditional

¹³ Menkel-Meadow (2006), above n7, 489-490.

¹⁴ Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (1981). This text presented a theory of negotiation that had been developed by the Harvard Negotiation Project at the Harvard University Law School. The authors were the Director and Assistant Director of that project. *Getting to Yes* has sold millions of copies worldwide, has been translated into more than thirty languages and has reached its fortieth reprint: Michael Wheeler and Nancy J

positional bargaining style. The positional bargaining approach to negotiation mirrors the competitive approach to decision making that is the basis of the formal legal justice system. Where mediation applies alternative approaches, such as problem-solving, consensual rather than competitive approaches are applied to decision making.

Getting to Yes outlined the core ideas distinguishing problem-solving bargaining from positional bargaining. Some of those ideas are:

- It is best to determine rather than to assume what disputant's interests and needs actually are;
- It is worthwhile searching for new resources or expanded options;
- Principles of merit or agreed upon standards can be used to find solutions rather than persuasion or overpowering of one disputant by another;
- Mutual solutions may be creative, contingent and more legitimate than those imposed on disputants; and
- The focus is on mutual rather than individual gain.¹⁵

There are a number of potential advantages of problem-solving negotiation over traditional positional negotiation. They include: the creation of an opportunity to address underlying issues, the consideration of a greater range of options, an emphasis on the emotional and procedural needs of the disputants in addition to their substantive needs, the potential for relationship building and trust promotion and the establishment of a model of cooperative behaviour that may be valuable in the

Waters, 'The Origins of a Classic: Getting to Yes Turns Twenty-Five' (2006) *Negotiation Journal* 475, 475 and 479; Menkel-Meadow (2006), above n7, 485.

¹⁵ Menkel-Meadow (2006), above n7, 491.

future.¹⁶ However, problem-solving negotiation is unlikely to achieve these potentials unless both disputants are committed to the problem-solving process. This will happen when their needs to negotiate a solution with each other and to invest time in the resolution of the dispute are prioritised over any desire to punish or take revenge upon their opponent.¹⁷

Problem-solving approaches have been readily adopted from negotiation theory into the mediation context. Problem-solving theory has dominated mediation policy and literature.¹⁸ In problem-solving mediation the mediator facilitates a mutual problem-solving approach to dispute resolution. This involves educating disputants about the problem-solving process and guiding them through negotiations in that style. The problem-solving approach separates the people from the problem, focuses on interests rather than positions and encourages the generation of a wide range of options before any decision is made.¹⁹

In the 1990s, new approaches to mediation began to emerge that mirrored a shift from the individualistic world view to a relational orientation.²⁰ Rather than the focus being on problem-solving, or transactional approaches to conflict, a transformative approach has emerged that focuses on relational approaches to

¹⁶ Nadja M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation: Theory and Techniques*, Butterworths Skills Series (1st ed, 1998) [2.21].

¹⁷ Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002), 126; Spegel et al, above n16, [2.21].

¹⁸ Kathy Douglas and Rachael Field, 'Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence' (2006) 13(2) *Murdoch University Electronic Journal of Law* 177, 182; National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (NADRAC, 2001); Dorothy J. Della Noce, Robert A. Baruch Bush and Joseph P. Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 39, 49; Boulle (2005), above n6, 46.

¹⁹ Roger Fisher, William Ury and Bruce Patton (ed) *Getting to Yes: Negotiating Without Giving In* (2nd ed, 1991).

²⁰ Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994) 255.

conflict.²¹ Here, the way parties relate to one another is treated as the source of conflict, rather than their competing interests.

Another relatively recent development in the mediation field is narrative mediation, which focuses on the way parties tell stories about their experiences of conflict.²² The aim is to find a shared narrative and thereby resolve the conflict between individual understandings. Narrative mediation also approaches conflict from a relational perspective.

Particular practices of mediation in connection with the formal legal system have also developed. Connection with the court system has shaped mediation in new ways. In the court-connected context, it has been claimed that the focus of mediation has often become procedural efficiency and a narrow legal definition of the problem.²³ Further, court-connected mediators are said to adopt a directive approach, hear the parties' stories, diagnose the problem, suggest a solution and then try to persuade the parties to accept that solution.²⁴ An adversarial negotiation style may be adopted to persuade the mediator to support one legal argument over another. Such practices mirror traditional legal processes such as trial and lawyer negotiation.²⁵

They have taken modern mediation away from its origins as an alternative to

²¹ The transformative approach was pioneered by Bush and Folger, see their book, above n20.

²² CRInfo, *Narrative Mediation: What is it?* (1999-2007, The Conflict Resolution Source, University of Colorado) <http://narrative-mediation.crinfo.org/narrative_whatitisit.jsp> (13th November 2008).

²³ James Alfini, John Barkai, Robert Baruch Bush, Michelle Hermann, Jonathon Hyman, Kimberlee Kovach, Carol Liebman, Sharon Press and Leonard Riskin, 'What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions' (1994) 9(2) *Ohio State Journal on Dispute Resolution* 307; Judge P Mahoney, 'Private Settlement – Public Justice' (2000) 31 *Victoria University of Wellington Law Review* 225; Janet Martin, 'Friendly Persuasion – How Mediation Benefits Case Management' (1996) 6 *Journal of Judicial Administration* 65; Nancy A Welsh and Peter T Coleman, 'Institutionalised Conflict Resolution: Have We Come to Expect Too Little?' (2002) 18 (4) *Negotiation Journal* 345.

²⁴ Barach Bush in Alfini et al (1994), above n23, 310.

²⁵ For the tendency for lawyer negotiation to be conducted in an adversarial manner see: Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem-Solving' (1984) 31 *UCLA Law Review* 754. See also [3.3.4] below.

traditional adversarial approaches to dispute resolution. Such approaches to court-connected mediation practice have been said to reduce the focus on self-determination, choice-making, communication and sharing of perspectives, which are important concepts in the mediation field.²⁶ In this thesis, these claims about court-connected mediation are tested in the Supreme Court of Tasmania.

2.3 Mediation in Australia

Formal mediation programmes have emerged in Australia in both the private and public spheres since the late 1970s.²⁷ The focus of mediation in the private sphere was initially in community disputes, primarily disputes between neighbours. The emphasis was on mediation as an alternative to legal avenues. Mediation was informal, confidential, responsive to the needs of disputants, flexible, empowering and potentially restorative of the relationship between the parties. Community justice centres²⁸ were the government funded organisations that pioneered mediation in community, public issues, family and victim-offender disputes.²⁹

Mediation in public institutions is by far the biggest growth area of mediation.³⁰

Governments have enthusiastically adopted mediation by legislating for its use in family, commercial, administrative, workers' compensation and anti-discrimination disputes.³¹ Trials of mediation were also conducted in many Australian courts and

²⁶ Barach Bush in James Alfini et al (1994), above n23, 310.

²⁷ Condliffe (2008), above n2, 106; David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (2005) [1.40].

²⁸ The first of the community justice centres was a pilot project in New South Wales. See *Community Justice Centres (NSW Pilot Project) Act 1979* (NSW). The Community Mediation Service of Tasmania was established in 1991 and is now known as Positive Solutions. See Positive Solutions <www.positivesolutions.com.au> (20th June 2005). For other examples see Condliffe (2000), above n2, 3.

²⁹ Condliffe (2008), above n2, 106.

³⁰ Spencer & Altobelli, above n27, [1.40].

³¹ Condliffe (2008), above n2, Chapter 4.

tribunals during the 1980s and 1990s.³² Since the mid 2000s all Australian courts and tribunals have referred matters to a dispute resolution programme of some kind, usually to a process described as ‘mediation.’³³

The nature of non-determinative processes connected with courts and called ‘mediation’ varies considerably.³⁴ There are not usually restrictions in legislation, policy, or guidelines, on the style of mediation that may be practised in the court setting in Australia.³⁵ Nor are there typically limitations on the roles that might be played by the parties in dispute, the lawyers or the mediator. This leaves scope for a broad range of practices in the court-connected setting.

2.4 Interactions between mediation and courts

Through court-connected mediation, the mediation field and the formal justice system have influenced one another. On the one hand, mediation has been shaped in particular directions when it occurs within the justice system. On the other hand, some changes to the legal system have been adopted in response to the growth of problem-solving, consensual and individualist approaches to dispute resolution.

There is some evidence that court-connected mediation has been shaped to fit the adversary legal system. In court-connected mediation, disputants may participate less

³² Bridget Sordo, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial' (1994) 5 *Australian Dispute Resolution Journal* 62.

³³ Sourdin (2005), above n2, 12; Australian Institute of Judicial Administration, *Case Management Seminar: Sydney, 25 February 2005* (AIJA, 2005) 9; National Alternative Dispute Resolution Advisory Council, *Who can refer to, or conduct, mediation? A compendium of Australian legislative provisions covering referral to mediation and accreditation of mediators* (NADRAC, 2004); Laurence Boulle, 'Extending the courts' shadow over ADR' (2001) 3(10) *ADR Bulletin* 117, 118.

³⁴ Astor and Chinkin (2002), above n17, 19 and Ch 8; Boulle (2005), above n6, Ch 11; Sourdin (2005), above n2, Ch 5.

³⁵ See [3.1.2] below.

than in other mediation contexts, expressions of opinion by the mediator about the merits of the case are common, individual sessions are often used more than joint sessions and outcomes usually reflect the remedies available at trial.³⁶ Some concern has emerged that many forms of dispute resolution have become corrupted by the persistence of adversarial values that are fundamental in the judicial system.³⁷ For example:

True to ADR's essential characteristics of innovation, creativity and experimentation, ADR in the courts involves continuing adaptation and evolution of ADR processes. But as governments, tribunals, and courts borrow, co-opt and adapt ADR methods, an ironic shift becomes apparent. Control over the dispute resolution processes moves to the institution. Processes that were open to negotiation become structured and subject to rules that operate systematically. Voluntary participation in an ADR process becomes mandatory participation. Self-resolution loses ground to professional representation. Processes that began informally are formalized, what was elective becomes directive. In short, rather than be designed to meet the specific needs and exigencies of the parties to the particular dispute, ADR techniques are adapted to fit the goals of the institution or system.³⁸

The former Chief Justice of the Supreme Court of Tasmania has suggested that the adoption of dispute resolution processes by courts may have taken attention away from the need to consider changes to the trial process and the way that courts manage litigation generally.³⁹

... I suggest that the growth of ADR and the corresponding disappearance of the trial should cause the judiciary to re-examine such fundamental matters as the importance of the single

³⁶ Nancy A Welsh, 'Making Deals in Court-connected Mediation: What's Justice Got to Do With It?' (2001) 79 *Washington University Law Quarterly* 787.

³⁷ Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World' (1996) 1 *Journal of the Institute for the Study of Legal Ethics* 49, 72-74.

³⁸ Margaret A Shone, 'Law Reform and ADR: Pulling Strands in the Civil Justice Web' (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, New Zealand, April 13-16 2004) 6.

³⁹ Chief Justice Peter Underwood AO, 'Alternative Dispute Resolution as a Judicial Tool (A comment)' (Paper presented at the Seventh Worldwide Common Law Conference, London, April 2007).

cataclysmic event, a continuous trial. ... Can there be some joining of the best of ADR and the best of the trial process that will give greater access to a just result in accordance with law for everyone?⁴⁰

The increasingly active case management by Australian courts over recent decades reflects a commitment to improving the efficiencies and effectiveness of the litigation process. Sometimes case management involves an identification of areas of agreement so that the triable issues can be narrowed. At other times it may involve referral to mediation or other dispute resolution processes.

There is clearly an inter-relationship between court-connected dispute resolution (including mediation) and the civil justice system.⁴¹ While court-connected mediation has become influenced by legal perspectives and practices, the traditional court processes have come under scrutiny for their failure to deliver some of the advantages of mediation and other dispute resolution processes.⁴²

Whilst it has also been argued by some critics of court-connected mediation that fundamental adversary principles of the legal system are threatened by the adoption of non-adversarial practices,⁴³ the accuracy of some assumptions underlying the

⁴⁰ Underwood (2007), above n39.

⁴¹ Astor & Chinkin (2002), above n17, Ch 2.

⁴² Tania Sourdin, 'Courts in Crisis? ALRC Inquiry into the Adversarial System' (1996) 70 *Reform* 43; The Australian Law Reform Commission, 'Managing Justice: A review of the federal civil justice system' (89, ALRC, 2000); Lord Woolf, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (Department for Constitutional Affairs, UK, 1996).

⁴³ See for example: Deborah R Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System' (2003) 108 *Penn St. L. Rev.* 165, 195: 'To encourage people to consider alternatives to litigation ... judges and mediators are telling claimants that legal norms are antithetical to their interests, that vindicating their legal rights is antithetical to social harmony, that juries are capricious, that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change.'

adversarial system has been questioned.⁴⁴ The adoption of mediation within the litigation system has provided an opportunity to reflect upon the nature of both mediation and the formal legal system.

2.5 The dilemma of court connection

The interaction between mediation and courts has presented a fundamental dilemma for court-connected mediation processes. In the court-connected context, the opposing ideologies of the mediation and formal legal worlds collide. There are some contradictions between them and these must be responded to one way or another. Each of the systems has a particular vision of how human beings can and should engage in and resolve conflict.⁴⁵ The role of courts in relation to civil disputes is to resolve disputes and interpret the law. Courts rely on rules of procedural fairness, consistency of outcomes and legally just results to fulfil this role.⁴⁶ Courts have an obligation to ensure that the processes that they sanction are an appropriate means of dispensing justice. This raises questions about the extent to which formal legal conventions should be imposed upon court-connected mediation, which were outlined in Chapter 1. The questions are: whether courts have an obligation to ensure fairness of the mediation process; to require mediated outcomes to comply with the law; or to intervene in lawyers' management of their clients' legal cases by prescribing roles for participants in mediation. Here, these three aspects of the dilemma of court-connection are described to support the development of these themes throughout the remainder of this chapter.

⁴⁴ Including assumptions of 'objectivity, neutrality, argument by opposition and refutation, and appeals to common and shared values and fairness.' Menkel-Meadow (1996), above n37, 51.

⁴⁵ Dorothy J. Della Noce, Joseph P. Folger and James R. Antes, 'Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection' (2002-2003) 3 *Pepperdine Dispute Resolution Law Journal* 11, 17.

⁴⁶ Louise Phipps Senft and Cynthia A. Savage 'ADR in the Courts: Progress, Problems, and Possibilities' (2003-2004) 108 *Penn St. L. Rev* 327, 336.

2.5.1 Fair process

The principle of procedural fairness is shared by mediation and the formal justice system.⁴⁷ Both dispute resolution systems value the fair treatment of disputants.

Procedural justice is achieved when disputants have an opportunity to be heard, when they believe that their story has been considered and when they believe that they have been treated in an even-handed and dignified manner.

Courts have an obligation to ensure that disputants are afforded procedural fairness in determinative processes and apply formal rules to protect litigants.⁴⁸ However, courts do not apply tests of procedural fairness to negotiation, which occurs outside the scrutiny of the court. The dilemma here is whether or not standards of procedural fairness should be applied to court-connected mediation. The court has both an opportunity and a greater obligation to scrutinise its own mediation processes than unassisted negotiation that occurs in connection with litigation. The obligation arises from the connection of the mediation process with the court administration, which is obliged to deliver due process and equal protection before the law.⁴⁹ However, the privacy of the mediation process impedes the ability of courts to scrutinise the fairness of mediation processes.

⁴⁷ Welsh (2001), above n36, 818-819.

⁴⁸ Wayne Brazil, 'Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns' (1999) 14 *Ohio State Journal on Dispute Resolution* 715, 727-728; Jeffrey Stempel, 'Beyond Formalism and false dichotomies: The need for institutionalizing a flexible concept of the mediator's role' (1997) 24 *Florida State University Law Review* 949, 977.

⁴⁹ Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2004: Part C Justice' (Australian Government Productivity Commission, 2004) [6.5]; See also Chapter 4 [2.1].

Court-connected mediation has produced tension between the desire to offer litigants a private opportunity to resolve their dispute consensually and the obligation of courts to scrutinise procedures which occur in connection with the formal litigation process. The adoption of a confidential process within the publicly funded justice system raises questions of 'whether such programs are public or private and what rules of procedure, ethics and substance should be applied in such hybrid settings.'⁵⁰ Private dispute resolution is not subject to the checks and balances of the public judicial system.⁵¹ Confidentiality tends to protect mediators from accountability for the techniques they might adopt to encourage settlement and frustrates parties from challenging the procedural fairness of the processes to which they might be referred.⁵² When mediation is mandatory, the parties are not choosing privacy, but having it imposed on them. In these circumstances disputants may view the justice system negatively for failing to provide them with legal relief in respect of their problems.⁵³

Welsh has considered the question of what standards of procedural fairness ought to apply to court-connected mediation and concluded that if all that court-connected mediation did was to facilitate bargaining, then the rules of procedural fairness would not apply.⁵⁴ However, she notes that court-connected mediation does more than facilitate bargaining, because when mediation is court-sponsored, it is part of a system whose business is justice, not just settlement.⁵⁵ An overemphasis on

⁵⁰ Carrie Menkel-Meadow, 'Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR' (1999) 15 *Ohio State Journal on Dispute Resolution* 19, 31.

⁵¹ Access to Justice Advisory Committee, *Access to Justice: An action plan* (1994), [16.24].

⁵² See for example *Tapoohi v Lewenberg [No2]* [2003] VSC 410 (Unreported, Habersberger J, 21st October 2003).

⁵³ Francis Regan, 'Dilemmas of Dispute Resolution Policy' (1997) 8 *Australian Dispute Resolution Journal* 5, 12-13.

⁵⁴ Welsh (2001), above n36, 830-831.

⁵⁵ Welsh (2001), above n36, 837.

efficiency as a goal of mediation has been noted to compromise the fairness of the process:

If what you want is a quick fix, faster/cheaper mediation and that's all you want, mediation can be a very serious problem in terms of cutting off people's rights and pushing them out of the system without their getting a fair process – whether it's a fair hearing or a fair mediation.⁵⁶

Judge Wayne Brazil, of the United States, suggests that the primary goal of mediators in court-sponsored programmes should be to promote the participants' respect for the integrity of the proceedings.⁵⁷ He notes that when mediators are working within the courts system, they are agents of '...a public institution...whose central imperative is process integrity.'⁵⁸ It is therefore essential that mediators promote and preserve public confidence in the integrity of the court-connected mediation process.⁵⁹ The decisions that parties make in court-connected mediation ought to be made in an atmosphere of fairness.

Some standards of procedural fairness have been developed for mediation in Australia. The Australian National Mediation Standards ('the Practice Standards') state as a guiding principle that '[a] mediator will conduct the mediation process in a procedurally fair manner.'⁶⁰ Procedural fairness safeguards include: the mediator assessing the willingness and ability of individuals to participate in the process, providing participants with an opportunity to be heard, balancing negotiations and

⁵⁶ Carol Liebman in Alfani et al (1994), above n23, 312-313.

⁵⁷ Wayne D. Brazil, 'Hosting Mediations as a Representative of the System of Civil Justice' (2007) 22 *Ohio State Journal on Dispute Resolution* 227, 241.

⁵⁸ Brazil (2007), above n57, 241.

⁵⁹ Brazil (2007), above n57, 241.

⁶⁰ *Australian National Mediator Standards: Practice Standards* (National Mediation Conferences Limited and Western Australian Dispute Resolution Association, 2007) ('The Practice Standards'), Standard 9.

facilitating the gathering of additional information or advice by one or more participants.⁶¹

Even though these mediation specific standards may be applied to court-connected mediation, the ability to assess or enforce adherence to those standards may be frustrated by the voluntary status of the Practice Standards.⁶² However, where a court-connected mediator is accredited under the Standards, there is an obligation to abide by these requirements. Even if clear guidelines were set by courts for their mediation programmes, the privacy of the process and the immunity bestowed upon many court-connected mediators would make it difficult to enforce such rules or standards. Ultimately, it is up to mediators to protect the integrity of the mediation process by doing all that they can to promote a perception of fairness of the mediation process.

2.5.2 Outcomes in accordance with the law

The courts' obligation to apply the law is a source of tension in court-connected mediation. The formal legal system exists for the purpose of resolving legal disputes according to the law. The rule of law and the doctrine of precedent are essential ingredients of the litigation system and are designed to result in predictability of judicial decisions. However, in negotiations (within or outside mediation or the courts), disputants are free to agree to outcomes that depart from legal norms.⁶³ Court-connected mediation outcomes that do not comply with precedent arguably create unpredictability. This is particularly relevant where mediation is mandatory.

⁶¹ *The Practice Standards*, above n60, Standard 9 (2), (3), (4), (5) and (6).

⁶² At the time of writing this thesis the National Mediation Standards are voluntary but it is anticipated that they may become mandatory in the future.

⁶³ Eisenberg (1976), above n1, 654.

When disputants are induced or forced to mediate and then agree to outcomes that depart from legal norms, it may be argued that the civil justice system has failed to apply the rule of law to their dispute.

Sometimes mediating parties may choose not to apply strict legal rules to their dispute, because they value other standards or outcomes more than those that would be achievable at trial. Where that election takes place within the court-connected context, the tensions between institutional obligations to apply legal rules with consistency and mediation ideals of flexibility and response to individual priorities become particularly apparent. Depending upon the circumstances, consensual decisions may reflect a prediction of the probable outcome at trial, they may be guided by precedent or, in some circumstances, those rules might be ignored in favour of prioritisation of the individual non-legal needs of the disputants.⁶⁴

Notwithstanding that there is some tension around courts' obligation to apply the law to disputes, all participants in mediation ought to have knowledge of the legal rules, remedies, rights and responsibilities in relation to their dispute.⁶⁵ Although disputants may develop outcomes that stray from strict legal rights and entitlements in order to maximise their individual priorities, agreement to such an outcome should be an informed choice. '[B]alancing legal rights and non-legal interests involves trade-offs, and making informed decisions about tradeoffs requires knowledge of law.'⁶⁶

Disputants may choose to depart from legal norms but ought to do so with accurate information about their legal rights and responsibilities.

⁶⁴ Menkel-Meadow (1996), above n37.

⁶⁵ Jacqueline M. Nolan-Haley, 'Court Mediation and the Search for Justice Through Law' (1996) 74 *Washington University Law Quarterly* 47, 65.

⁶⁶ Nolan-Haley (1996), above n65, 66.

2.5.3 Disputant participation

The role of disputants is another area that presents a dilemma for court-connected mediation. On the one hand, the participation of disputants in the resolution of their disputes is a fundamental feature of mediation, reflecting the origins of mediation as a self-empowering process that enables individuals to take control of their disputes.⁶⁷ On the other hand, in legal processes disputants are encouraged to allow others to control the way their disputes are resolved. The traditional model of the lawyer-client relationship is one of expert-naïf, where the client, although ‘instructing’ the lawyer, is expected to take a secondary role in both negotiations and formal legal processes.⁶⁸ In the informal arena of lawyer negotiation, which resolves much litigation, clients are not typically involved directly.⁶⁹ In the formal legal process, although some litigants are self-represented, it is generally considered preferable if litigants rely upon a lawyer spokesperson to represent them to the court.⁷⁰ The role of the lawyer in the court-room is to speak for the client, to protect the client’s interests and to conduct the proceedings on the client’s behalf. When mediation occurs within the context of ongoing litigation, the opportunity for direct disputant participation may not be realised, particularly when lawyers adopt their customary trial roles in that context.

⁶⁷ See [2.1] above and [4.2] below.

⁶⁸ Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (2008), Chapter 6.

⁶⁹ MacFarlane (2008), above n68, Chapter 4.

⁷⁰ The increase in litigants in person has been treated as a ‘problem’ requiring management by courts. See for example: Australian Institute of Judicial Administration, ‘Litigants in Person Management Plans: Issues for Courts and Tribunals’ (AIJA Inc., 2001); Australian Institute of Judicial Administration, ‘Forum on Self-represented Litigants’ (AIJA and Federal Court of Australia, 2004).

Another factor that contributes to the minimisation of the disputant's role in lawyer negotiation and trial processes is the narrow scope of discussions in these forums. In litigation and lawyer negotiation, the focus of conversations is generally a narrow consideration of legal and monetary concerns, about which the lawyers, not parties, are the experts. By contrast, in mediation the focus may be a broader range of issues about which the disputants themselves are the experts.

Lawyers' approaches to mediation have been identified as a significant barrier to the realisation of benefits of direct disputant participation in mediation.⁷¹ Lawyers in many jurisdictions tend not to recognise the opportunity for direct discussion between parties as an important goal of mediation and do not routinely encourage active participation by their clients in the mediation process.⁷²

Court-connected mediation provides an opportunity for litigants to be more involved in the resolution of their legal dispute than they might otherwise be. This might include some control over the matters that will be discussed as well as the opportunity to participate directly in the court-connected mediation. Legal cultural habits, rather than principles, limit these opportunities in the court-connected context.

In conclusion, the interaction of mediation and courts poses a dilemma for courts about their responsibilities towards the mediation process in that context. The

⁷¹ Julie MacFarlane, 'Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) *University of Missouri Journal of Dispute Resolution* 244, 264.

⁷² See for example: Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (Victorian Department of Justice, 2009); Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009); Stevens H. Clarke, Elizabeth D. Ellen and Kelly McCormick, 'Court Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects' (North Carolina Administrative Office of the Courts, 1995).

process falls between the two traditional legal processes of lawyer negotiation and trial. It is a consensus based decision making process like negotiation but has a court-sanctioned third party like trial. Clients are often present at court-connected mediation but lawyer negotiation tends to occur without clients being present. Courts have had to respond to the questions of the degree to which court-connected mediation should comply with formal rules of procedural justice, apply the law to disputes, produce outcomes that accord with legal outcomes, be open to scrutiny or involve the disputants. This thesis investigates the ways that the Supreme Court of Tasmania, its mediators and the lawyers who practise within the programme have responded to these questions.

3 Diversity of mediation theory and practice

The mediation field accommodates a broad range of theories and practices. Here, the mediation field is examined and the question of whether or not it is appropriate to restrict expectations about court-connected mediation to particular theories or practice models is considered. The diversity of mediation theory and practice is explained through the ways that mediation is defined, different ideologies and purposes that are pursued through mediation and the variety of practice models that have developed.

3.1 Defining mediation

The ways that mediation has been defined generally and in court-connected contexts are considered here.

3.1.1 Definitions of mediation

Mediation is a non-determinative process where a third person assists the disputants to communicate with each other in relation to the conflict between them. The core elements of mediation are:

- There is a third person present;
- The third person does not determine the outcome; and
- The third person assists the disputants to communicate in relation to the conflict between them.⁷³

Within these parameters, there are a wide range of processes that fall under the 'mediation' banner.

Many descriptive definitions of mediation are broad, generic and purport to be inclusive of all mediation styles.⁷⁴ Broad definitions of mediation encourage a mixed practice to occur.⁷⁵ In situations where there are no clear guidelines about when particular techniques are appropriate, the style of mediation is left to the discretion of the mediator.

⁷³ Wall et al identify the core mediation process as:

- (1) assistance or some form of interaction by
- (2) a third party who
- (3) does not have the authority to impose an outcome.

James A Wall, John B Stark and Rhett L Standifer, 'Mediation: A Current Review and Theory Development' (2001) 45(3) *The Journal of Conflict Resolution* 370, 375.

⁷⁴ For examples of generic definitions of mediation see M Roberts 'Systems or Selves? Some Ethical Issues in Family Mediation' (1992) 10 *Mediation Quarterly* 11 cited in Boulle (2005), above n6, 7; Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (3rd ed, 2004) 278; Laurence Boulle, *Mediation: Skills and Techniques*, Butterworths Skills Series (2001) 1.

⁷⁵ Lela P Love, 'The top ten reasons why mediators should not evaluate' (1997) 24 *Florida State University Law Review* 937, 948; Stempel (1997), above n48, 956.

In contrast, some definitions of mediation reflect a narrow understanding of mediation as a purely facilitative process. An example is the often cited definition by Folberg and Taylor:

[Mediation] can be defined as the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.⁷⁶

This definition was cited by politicians when introducing the *Alternative Dispute Resolution Bill* to the Tasmanian Parliament.⁷⁷ However, a broader definition is contained in the *Alternative Dispute Resolution Act*, which reads:

“mediation”, which includes conciliation, means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.⁷⁸

This definition does not specify any features of the process other than that there is a third party assisting the parties, that the parties determine the outcome, and that the mediator assists the parties to negotiate. In other words, it simply constitutes the three generic elements of mediation that were identified above. Furthermore, by including conciliation in the definition of mediation, the legislature has specifically included an evaluative approach in its definition of mediation.⁷⁹

In contrast, Folberg and Taylor’s definition describes facilitative mediation, a process which accords with the generic elements mentioned above and which has the following additional characteristics:

⁷⁶ J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (1984) 7 cited in Astor & Chinkin (2002), above n17, 83; Boule (2005), above n6, 6. A similar definition of mediation has been adopted by National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms : The use of terms in (alternative) dispute resolution* (NADRAC, 2003).

⁷⁷ Tasmania, *Parliamentary Debates*, House of Assembly, 21st August 2001, (Peter Patmore, Minister for Justice and Industrial Relations), 54; Tasmania, *Parliamentary Debates*, Legislative Council, 29th August 2001, (Doug Parkinson, Deputy Leader of the Government in the Council), 6.

⁷⁸ *Alternative Dispute Resolution Act* 2001 (Tas) s3(2).

⁷⁹ NADRAC (2003), above n76.

- The third person is neutral, meaning that they are independent of the parties' social networks and will not receive benefit from one party in return for their conduct during the mediation;⁸⁰
- The third person is also impartial, meaning that they are unbiased in relation to the disputants, their interests and the solutions they propose.⁸¹
- The third person assists the disputants to participate in an interest-based problem-solving negotiation; and
- The aim of the mediation process is to resolve the dispute.

The facilitative mediation model is reflected in the definition of mediation adopted by the National Alternative Dispute Resolution Advisory Council, which advises the Australian Attorney-General in relation to dispute resolution:

Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted...⁸²

Definitions of mediation that limit it to a facilitative process exclude many alternative mediation qualities, styles and theoretical frameworks. For example, mediation is often conducted by third parties who have an interest in the dispute, such as where they are employers and the disputants are their employees. The maintenance of impartiality is difficult when there is an imbalance of power between

⁸⁰ Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed, 2003) 53.

⁸¹ Moore, above n80, 53.

⁸² NADRAC (2003), above n76, 9. This definition has been adopted by Standards Australia, *AS4608-2004 Dispute Management Systems* (2nd ed, 2004).

disputants or when the mediator has strong personal views about the ‘fair’ resolution of the dispute. Many mediators offer an opinion about the merits of a legal claim or recommend an appropriate range of outcomes. Mediator input in the content of disputes by providing substantive advice or recommendations falls outside the facilitative model. Moreover, parties in mediation frequently engage in positional negotiation, which is the antithesis of interest-based problem-solving negotiation. Sometimes the aim of mediation is not to resolve a dispute. It may be to define and limit the areas of disagreement between the parties or to terminate the relationship between them effectively. Narrow definitions, where they purport to be a definition of mediation in a generic sense, exclude the variety that is evident within mediation theory and practice.

3.1.2 Definitions of mediation in the court-connected context

Mediation is frequently defined generically by parliaments and institutions such as courts.⁸³ In the court-connected context, broad and inclusive definitions of mediation tend to be preferred over narrow and limiting definitions. This means that court-connected mediation is not restricted to particular models of practice. Boule has observed that there is ‘...a contemporary tendency for legislatures to favour the term mediation as a generic concept...’⁸⁴ Consequently, most legislation fails to draw distinctions between the various models and approaches to mediation. This includes the definition that applies to the Supreme Court of Tasmania, discussed in [3.1.1] above and also considered in Chapter 4.⁸⁵

⁸³ See for example: *Alternative Dispute Resolution Act 2001* (Tas) s3(2); *District Court Act 1973* (NSW) s163(1); *Supreme Court Act 1970* (NSW) s110I(1); *Mediation Act 1997* (ACT) s3(1).

⁸⁴ Boule (2005), above n6, 113.

⁸⁵ *Alternative Dispute Resolution Act 2001* (Tas) s 3(2).

Accordingly, in this thesis, the definition of mediation that is adopted in relation to court-connected mediation is broad and inclusive. The legislative frameworks applying to most court-connected programmes, including in the Supreme Court of Tasmania, define mediation broadly. It is not asserted that the facilitative model of mediation, nor any other model, is the model that ‘ought’ to be practised in the court-connected context.

This thesis investigates the form that mediation takes within the court-connected context in the Supreme Court of Tasmania. That inquiry is not limited by narrow concepts of what mediation ought to look like within the court setting.

3.2 Diversity in theory about the purpose of mediation

Mediation may promote a range of purpose including: the satisfaction of individual interests, equality, transformation or efficiency. Mediation literature demonstrates diverse perspectives about the primary purpose of mediation. ‘Depending upon one’s philosophy of mediation, the cardinal virtues of this process can be self-determination, autonomy, empowerment, transformation, and efficiency.’⁸⁶

Bush and Folger identify mediation ideologies that illustrate a range of perspectives about what mediation is and what it ought to achieve.⁸⁷ They emphasise that mediation is not value-free and their aim is to identify the values that underpin

⁸⁶ Nolan-Haley (1996), above n65, 54.

⁸⁷ Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Revised ed, 2005) 9-18.

various concepts of mediation.⁸⁸ Mediation ideologies reflect distinct social needs and aspirations.⁸⁹ Depending upon the ideological basis from which a person views mediation, the overriding purpose might be to satisfy individual needs, to promote equality between parties, or to transform the way parties relate to others.⁹⁰ These ideologies are considered below, including their application in the court-connected context.

Here, the emphasis is on the differences between the ideologies promoted through mediation. Common elements are discussed in [4] below. The institutional purposes for which mediation has been promoted in courts are also considered.

3.2.1 The satisfaction purpose

The purpose of satisfaction reflects the interest-based problem-solving approach to conflict.

The Satisfaction Story's premise is that the most important private benefit of mediation is maximising the satisfaction of individuals' needs or, conversely, minimising their suffering – producing the greatest satisfaction, or the least harm, for the individuals on both (or all) sides of a conflict.⁹¹

Where satisfaction is prioritised, the ultimate aim of mediation is to resolve the dispute in a way that maximises the satisfaction of all parties' individual needs.

Satisfaction may be promoted by many features of a mediation process, including: disputant participation in the process and control of content, identification and

⁸⁸ Bush & Folger (2005), above n87, 1.

⁸⁹ 'ideology' is defined as 'A systematic scheme of ideas, usu. relating to politics or society, or to the conduct of a class or group, and regarded as justifying actions, esp. one that is held implicitly or adopted as a whole and maintained regardless of the course of events.' *Oxford English Dictionary Online* (2000) Oxford University Press <<http://dictionary.oed.com>> at 5th December 2007

⁹⁰ Bush & Folger (2005), above n87, 18-22.

⁹¹ Bush & Folger (2005), above n87, 20.

exploration of the issues, flexibility in the process to meet individual needs and cooperation between disputants to resolve their mutual problem.

The satisfaction purpose is individualist because the focus is on the individual needs and interests of the disputants. Mediation from this perspective is a private dispute resolution tool that only indirectly benefits the wider community. In the court-connected context, where litigation has commenced, there is some public element to the dispute, even if the mediation process is conducted in private. This may create tensions where the satisfaction purpose is promoted in court-connected mediation.

The satisfaction purpose is interest-based as opposed to rights-based. The priority of the satisfaction of individual needs and interests distinguishes mediation from the formal legal system which prioritises precedent and decision making according to strict legal entitlements. This may produce some conflicting perspectives in the court-connected context; resulting from the tensions between the legal view that external rules determine the appropriateness of outcomes and the satisfaction view that individual priorities determine the appropriateness of outcomes. This tension may be illustrated by a hypothetical example involving two plaintiffs who have suffered the same injury in similar circumstances and have both instituted legal action.

Illustrative Example:

The contrast between the purposes of satisfaction and achieving a rights-based outcome.

The plaintiffs

Plaintiff A has high expectations of her legal rights, is well resourced and instructs her lawyer that she wants to recover her full legal entitlements. Plaintiff A's claim proceeds to trial after unsuccessful attempts to negotiate a settlement and she recovers \$500,000 plus costs, which after paying her solicitor-client legal costs leaves her with \$400,000. She is completely satisfied. She believes that justice has been done and that her lawyer has represented her well. She loved having her day in court and feels vindicated.

Plaintiff B is less confident and since the accident she and her husband have struggled to maintain mortgage repayments on their home. She instructs her lawyer that the legal case is placing high levels of stress on her family and that she wants to resolve the matter as quickly as possible, that what she really wants is to pay the amount outstanding on the mortgage and that she will be content if that need is satisfied. At a court-connected mediation arranged soon after, Plaintiff B agrees to an 'all in' settlement of \$300,000. After paying her legal fees this leaves her with \$250,000 which she uses to pay out the outstanding balance on her mortgage. She is completely satisfied and believes that her lawyer has listened to and understood her.

From the satisfaction perspective, both of the plaintiffs have achieved outcomes which satisfy their needs and interests. Therefore both outcomes can be seen to be

appropriate, notwithstanding the disparity between the amounts received by the two disputants.

The defendants' lawyer

To illustrate how a lawyer might view these outcomes, the perspective of the defendant's legal counsel can be hypothesised. In this example, the same defendant insurer is involved in both cases and the same lawyer acts for it.

Although the defendant's lawyer is frustrated by what he perceived to be the belligerent attitude of both Plaintiff A and her lawyer, he considers that the court delivered a fair outcome that accorded with precedent and recognised Plaintiff A's strict legal entitlements. The outcome is within the range of likely trial outcomes that he anticipated, so his insurer client was satisfied with the result.

The defendant insurer was particularly happy with the result that the lawyer achieved in relation to Plaintiff B's claim. This was an early settlement below the bottom end of the anticipated range of settlement outcomes that the lawyer had predicted.

However, the defendants' lawyer walked away from the court-connected mediation with a sense of unease. He commented to the insurer's representative that 'we shouldn't have settled that, not for that amount anyway.' He sees the result as a windfall to his client. He believes that Plaintiff B has been seriously short changed in terms of her legal entitlements and holds Plaintiff B's lawyer responsible for the less than adequate outcome achieved for Plaintiff B. In his view, if Plaintiff B's lawyer had argued more forcefully on behalf of her client, a result would have been achieved that reflected the appropriate legal outcome.

The contrasts between individualised and rule based measures of the appropriateness of outcomes demonstrates one of the dilemmas in court-connected mediation. Where mediation occurs within the legal system, does it matter that one plaintiff received \$400,000 and the other only \$250,000? The answer depends upon whether it is expected that court-connected mediation should deliver outcomes in accordance with legal rights, as is required in a court.⁹² If not, it may be sufficient if both Plaintiff A and Plaintiff B were provided with an assessment of their legal positions to enable them to compare that position with any proposed outcomes and decide upon their own priorities. In other words, that they have been provided with an assessment of their legal rights and entitlements but are not bound to a narrow range of outcomes.

Court-connected mediation is sometimes criticised because vulnerable disputants may be denied their legal entitlements, particularly where they do not have adequate resources to proceed to trial.⁹³ Such criticisms imply that the purpose of satisfaction should be tempered by some objective criteria such as the anticipated range of legal outcomes. This means that disputants ought to be aware of the legally available outcomes and make an informed decision about any settlement agreement that they enter into.⁹⁴ The law is always a relevant consideration that provides a background to negotiations within the litigation context and in all mediation processes.

⁹² See [2.5.2] above.

⁹³ See for example: Philip Davenport, 'What is Wrong with Mediation' (1997) 8 *Australian Dispute Resolution Journal* 133; Hensler (2002), above n43; Hedy Meggiorin, 'Justice in a Flash if You've Got the Cash' (1998) 9(4) *Australian Dispute Resolution Journal* 246; Menkel-Meadow (1999), above n55.

⁹⁴ The consideration of the objective standards that apply to a dispute is recommended by Fisher, Ury & Patton as an important aspect of principled bargaining. Fisher et al (1991), above n19.

When mediation is court-connected, there is potential for the satisfaction purpose to be promoted to some degree. Within the privacy of mediation, parties may pursue satisfaction of their individual goals and imaginative solutions. However, there are some additional considerations that apply in that context, including the public nature and rights-based focus of the litigation system. Court-connected mediation is conducted in the shadow of that system. The satisfaction of individual interests and priorities may therefore be promoted in court-connected mediation, in conjunction with other considerations, including the legal standards that apply to the dispute.

3.2.2 The equality purpose

An alternative mediation ideology prioritises equality. If the equality purpose is prioritised, then ‘the most important concern is promoting equality between individuals or, conversely, reducing inequality.’⁹⁵ Like the satisfaction purpose, the equality purpose also aims to resolve the immediate dispute between the disputants.

Equality may be promoted by many features of a mediation process, including: providing disputants with an equal opportunity to participate in the process, encouraging equal disputant control of content, accurate disputant knowledge about the alternatives to an agreed outcome, including the likely legal outcome (to safeguard for fair outcomes) and cooperation between disputants and a willingness to treat each other fairly.

The equality purpose of mediation is promoted by two groups of people; those who believe that mediation has a tendency to oppress particular members of society and

⁹⁵ Bush & Folger (2005), above n87, 20.

conversely, those who believe that mediation can achieve social justice.⁹⁶ Some critics of mediation assert that mediation should ensure fairness but that the structures of mediation do not protect vulnerable or less powerful disputants and thereby can contribute to inequality.⁹⁷ On the other hand, there are some writers who maintain that mediation achieves equality by delivering social justice.⁹⁸ From this perspective, disempowered members of society are empowered by the forging of links between such groups and the provision of a forum in which they have a voice.

The equality purpose is related to the satisfaction purpose because the meeting of needs and alleviation of suffering is emphasised, however, the priority is that needs are met and suffering alleviated equally between the disputants, rather than to their individual satisfaction.⁹⁹ The concept of equality introduces a collectivist sentiment into mediation and moves away from the individualism promoted by the satisfaction purpose. From this perspective, mediation has a public as well as a private purpose.

The equality purpose encourages reference to some external standard of fairness in process or outcome to ensure that equality is promoted and inequality is addressed. The imposition of such external standards can encourage more of a rights-based than an interest-based focus. This potential is likely to be magnified in the court-connected context, where the determination of rights by a court forms a powerful background to the process. Legal standards apply equally to all disputants. Therefore,

⁹⁶ Bush & Folger (2005), above n87, 20.

⁹⁷ Bush & Folger (2005), above n87, 21; Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "the Law of ADR"' (1991) 19 *Florida State University Law Review* 1; Owen Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073; Rachael Field, 'Federal family law reform in 2005: the problems and pitfalls for women and children of an increased emphasis on post-separation informal dispute resolution' (2005) 5(1) *Queensland University of Technology Law and Justice Journal* 28.

⁹⁸ Bush & Folger (2005), above n87, 11-13 and 21.

⁹⁹ Bush & Folger (2005), above n87, 20.

there are links between the equality ideology of mediation and the formal legal system. Where mediation takes place within the context of the public justice system there is likely to be some emphasis on the equality of the process and objective fairness of outcomes. These may mirror legal standards of procedural fairness and substantive justice.¹⁰⁰

3.2.3 The transformation purpose

Bush and Folger focus much of their attention on the purpose of transformation, which is an ideological development of mediation theory and practice that they pioneered.¹⁰¹ They define the transformation purpose as follows:

The Transformation Story's premise is that the most important benefit of mediation is the transformation of the parties' conflict itself from a negative and destructive interaction to a positive and constructive one – which represents both a private benefit to them and a public benefit to society.¹⁰²

The transformation purpose has both an individualist and collectivist focus. Attention is placed on a particular relationship for the ultimate purpose of promoting peace in the broader community.

The transformation purpose has emerged in mediation theory in a movement away from the problem-solving approaches to mediation. It developed partly in recognition of some shortcomings in the application of problem-solving approaches such as the tendency to overemphasise settlement and thereby contain the conflict interaction rather than encouraging people to explore their conflict.¹⁰³ According to the transformative purpose, the dispute is a symptom of the true problem, which is the

¹⁰⁰ See [2.5.1] and [2.5.2] above.

¹⁰¹ Bush & Folger (2005), above n87.

¹⁰² Bush & Folger (2005), above n87, 21.

¹⁰³ Bush & Folger (2005), above n87, 1.

way the individuals relate to one another. The resolution of the immediate dispute may be an incidental consequence of the mediation process, but the real issue is relational.¹⁰⁴

Transformation is focused on the relationship between the disputants rather than focusing on either their interests or their rights. Two fundamental concepts of the transformation purpose are ‘empowerment’ and ‘recognition.’ Empowerment is the development within individuals of a sense of their own value, strength and capacity to make decisions and to handle their own problems.¹⁰⁵ Recognition is the acknowledgement, understanding or empathy for the situation and views of the other disputant.¹⁰⁶ Transformative mediation has the capacity to foster empowerment and recognition in disputants, which are qualities that will result in constructive interaction between them.¹⁰⁷

The purpose of transformation may be promoted by many features of mediation, including: direct disputant participation in the process, disputant control of both process and content, a flexible process that can be adapted to meet the individual needs of the disputants, cooperation between disputants and commitment to the mediation process.

Because court-connected mediation occurs within a problem-solving framework where the aim is to resolve disputes, the purpose of transformation is generally not

¹⁰⁴ Spencer & Altobelli (2005), above n27, [5.55].

¹⁰⁵ Bush & Folger (2005), above n87, 22.

¹⁰⁶ Bush & Folger (2005), above n87, 22.

¹⁰⁷ Bush & Folger (2005), above n87, 21.

prioritised in court-connected mediation.¹⁰⁸ The transformation model of mediation is rarely practised in the court-connected context. On the one hand, Hensler has opposed transformative court-connected mediation on the basis that the goals of transformation are not appropriate for a public justice system.¹⁰⁹ She believes that these goals are private goals that can be pursued outside the civil justice system.¹¹⁰ Litigants are presumed to be seeking finalisation rather than enhanced communication.¹¹¹ This assumes that the private goals of parties ought not be pursued in the public-private context of court-connected processes.

On the other hand, Bush has challenged those who exclude transformation from the spectrum of processes that might be practised in a court-connected context:¹¹²

It is certainly true, there are cases where people don't want to have somebody assist them in approaching conflict as a sort of change process. If so, then that shouldn't happen; that should be clearly a choice of the parties. On the other hand, if this kind of approach is not even available, because institutionalization has made it difficult or impossible for this to occur in mediation, then that's a limitation of choice of a different kind.¹¹³

In 1998, Franz noted trends in relationship building management techniques and posited that it was becoming increasingly possible to imagine public sponsorship of process-oriented approaches to mediation such as transformative mediation.¹¹⁴ A prominent example of such public sponsorship is the United States Postal Service's

¹⁰⁸ See also NADRAC (2003), above n76, 9. Transformative mediation is not defined in this document, and falls outside both of NADRAC's definitions of mediation. Sourdin (2005), above n2, 29.

¹⁰⁹ Hensler (2002), above n43, 98.

¹¹⁰ Hensler (2002), above n43, 98.

¹¹¹ Peter N Thompson, 'Enforcing Rights Generated in Court-Connected Mediation - Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice' (2004) 38 *Ohio State Journal on Dispute Resolution* 509, 568.

¹¹² Baruch Bush in James Alfini et al (1994), above n23, 331.

¹¹³ Baruch Bush in James Alfini et al (1994), above n23, 331.

¹¹⁴ Patricia L. Franz, 'Habits of a Highly Effective Transformative Mediation Program' (1998) 13(3) *Ohio State Journal on Dispute Resolution* 1039, 1041.

mediation programme for the resolution of employee disputes, which adopts a transformative approach.¹¹⁵ Franz cautions that in implementing a transformative approach in the context of a court, the potential impacts of both the adversarial culture of the court system and the outcomes-based orientation of current mediation practices would need careful consideration.¹¹⁶

Although there is theoretical potential for transformative approaches to mediation to be adopted in a court-connected programme, there are significant obstacles that would need to be overcome before this could be done effectively.

3.2.4 The purposes of court-connected mediation

Against the background of the theoretical purposes that may be promoted in mediation, the instrumental purposes for which mediation has been adopted by courts should be acknowledged. Commentators have suggested that mediation was adopted by courts to solve its problems of delay rather than to embrace mediation ideology.¹¹⁷

For example, McEwen and Wissler note that:

[I]t is not at all clear that ‘mediation ideology’ has driven the development of most civil, court-based mediation programmes dealing with the vast majority of money-damages cases. Indeed, much more pragmatic concerns – the inefficiencies and slowness of litigation and the negotiation that occurs in its midst – are likely to be at work.¹¹⁸

¹¹⁵ Lisa B Bingham, ‘Mediation at Work: Transforming Workplace Conflict at the United States Postal Service’ Chapter 5 in Jonathon D Breul and Nicole Willenz Gardner, *Human Capital 2004* (Rowman and Littlefield Publishers, Inc., 2004).

¹¹⁶ Franz (1998), above n114, 1041.

¹¹⁷ Frank E. A. Sander, ‘The Obsession with Settlement Rates’ (1995) *Negotiation Journal* 329; The Hon Justice James Spigelman, ‘Just, Quick and Cheap – A Standard of Civil Justice’ (Paper presented at Opening of Law Term, Parliament House, Sydney, 31 January 2000); Welsh and Coleman (2002), above n23.

¹¹⁸ Craig A McEwen and Roselle L Wissler, ‘Finding Out If It Is True: Comparing Mediation and Negotiation Through Research’ (2002) *University of Missouri Journal of Dispute Resolution* 131, 139.

This comment indicates that the primary purpose of court-connected mediation, from the view of courts at least, may not be based upon any of the mediation purposes explored above. Instead, the purpose of court-connected mediation may be to solve practical problems faced by the courts. In order to investigate this further, it is useful to conduct an analysis of the institutional objectives of court-connected mediation.

The analysis starts with a fundamental question: ‘what is the purpose of court-connected mediation?’ Unfortunately, the goals of court-connected mediation programmes in Australia are rarely articulated.¹¹⁹ It has been suggested that the enthusiasm of court administrators for mediation was founded primarily on a perception of mediation as a case management tool¹²⁰ rather than on an interest in incorporating any of the mediation values identified above into the formal justice system.¹²¹

The institutional goal of efficiency

In the 1980s and 1990s, courts generally were widely criticised for being inaccessible, expensive and plagued by delay.¹²² The adversary nature of the

¹¹⁹ Kathy Mack, *Court Referral to ADR: Criteria and Research* (National ADR Advisory Council and Australian Institute of Judicial Administration, 2003) 17.

¹²⁰ Astor & Chinkin (2002), above n17, 245-246; Jill Hunter, Camille Cameron and Terese Henning, *Litigation I: Civil Procedure* (7th ed, 2005) [2.17]; Martin (1996), above n23, 66.

¹²¹ Nadja Alexander, 'Mediation on trial: ten verdicts on court-related ADR' (2004) 22(1) *Law in Context* 8, 17.

¹²² ALRC (2000), above n42; Access to Justice Advisory Committee (1994), above n51; Attorney-General of Ontario, 'The Modern Civil Justice System: An Overview Summary of the First Report' (Ontario Ministry of the Attorney General, 1995); Canadian Bar Association, 'Report of the Canadian Bar Association Task Force on Civil Systems of Justice' (Canadian Bar Association, 1996); Woolf (1996), above n42; Deborah R Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System' (2003) 108 *Penn St. L. Rev.* 165, 168; Brian Withers, 'The Future of Adversarial Justice' (Paper presented at the 17th AIJA Annual Conference, Adelaide, 6-8 August 1999) 1; Sir Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th AIJA Annual Conference, Adelaide, 6-8 August 1999) 1. See also Chief Justice Cox, 'Report of the Chief Justice of the Supreme Court of Tasmania: Annual Report 1999/2000' (Supreme Court of Tasmania, 2000) 'The time taken to finalise civil matters is of increasing concern to the Court. With the need to devote increasingly large proportions of Court

litigation system was seen to be problematic because it exacerbated these problems.¹²³ The negative consequences of delay include higher financial and emotional costs for disputants, loss of evidence or legal remedies, an increased likelihood of professional negligence and decreased confidence in the legal system.¹²⁴

Court-connected mediation has been promoted and supported on the basis that it is cheaper, quicker, more readily accessible and less complex than judicial adjudication.¹²⁵ Mediation has been promoted as offering informality and direct disputant participation, qualities which theoretically improve accessibility. It also provides an opportunity for cooperation.

One of the big efficiency benefits of mediation is that it has enabled courts to facilitate early settlement of litigated matters. Before court-connected mediation was introduced, the overwhelming majority of civil claims were settled prior to trial.¹²⁶ However, they were often settled literally at the door of the court, on the day of trial. This created problems for courts because judges were left with an empty docket, as matters were settled without there being time to reallocate the judge's time to another case. Mediation has enabled courts to reduce waiting lists for trial, because it has

time and resources to the resolution of criminal matters, the time taken to finalise civil matters is increasing.'

¹²³ Although the Australian legal system is a blend of adversarial and non-adversarial elements, it has more adversarial than inquisitorial features and is therefore described as an adversary legal system. See Tania Sourdin, 'Law and the Cultural Shift: looking beyond europe for litigation reform ideas' (1996) (70) *Reform* 25, 44; Tania Sourdin, 'Beyond the adversarial system of litigation' (1997) (53) *Refresher* 22, 22.

¹²⁴ Canadian Bar Association (1996), above n122, 15.

¹²⁵ Mahony (2000), above n23.

¹²⁶ Marc Galantar, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society' (1983) 31 *UCLA Law Review* 4, 26; McEwen and Wissler (2002), above n118.

facilitated earlier settlements in some cases.¹²⁷ By introducing court-connected mediation, often mandatory in nature, courts have been able to encourage settlement to occur earlier in the litigation process. Rather than settling cases that would otherwise actually be tried, mediation has created a forum for settlement of cases that would otherwise have been settled through processes such as unassisted lawyer negotiation. The cases that are bound for settlement tend to be recognised before a trial date is allocated, because mediation is attempted. Therefore, mediation may be a stimulus for earlier negotiation between lawyers than would otherwise occur.

Another efficiency benefit that court-connected mediation has achieved for courts, is that it may streamline the remaining legal process even for those cases that do not settle at mediation.¹²⁸ For example, the areas of dispute may be more clearly identified, which enables a narrowing of the issues that need to be argued at trial. Furthermore, the sharing of information that occurs at mediation may clarify the legal arguments that will be made between the parties and the evidence that will be necessary to support those arguments. These factors may decrease the amount of time required to try a case. Another benefit of clarifying the legal cases is the

¹²⁷ The Hon Justice John Hansen, 'Facing New Challenges' (Paper delivered at 17th AIJA Annual Conference, Adelaide, 6-8 August 1999); Robert G Hann et al, 'Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1). Final Report – The First 23 Months (Robert Hann and Associates Limited/Ontario Ministry of the Attorney-General, 2001). Cf. mixed findings in James S Kakalik et al, 'Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act' (MR-800-ICJ, RAND, 1996). See also Roselle L. Wissler, 'The effectiveness of Court-connected Dispute Resolution in Civil Cases' (2004) 22 (1-2) *Conflict Resolution Quarterly* 55; Mack (2003), above n119, regarding mixed empirical reports regarding the impact on timing of settlement.

¹²⁸ K Saville-Smith and R Fraser, 'Alternative Dispute Resolution: General Civil Cases' (New Zealand Ministry of Justice, 2004) Part 6; Keith Schildt, James Alfini, Patricia Johnson, 'Major Case Mediation Pilot Program: 17th Judicial Circuit of Illinois' (College of Law, Northern Illinois University, 1994); Hann and Baar et al (2001), above n120, Chapter 5 [5.3-5.4]; MacFarlane (2002), above n64, 266.

exposure of parties to a ‘reality check’ of the weaknesses in their case, which may encourage settlement.¹²⁹

One of the issues in court-connected mediation is that if there is an overemphasis on efficiency, without reference to other aspects of mediation, there is a danger that the richness and the variation that could have been present in mediation will be lost.¹³⁰

The goal of efficiency impacts on the nature of court-connected mediation by creating pressure to find ‘quick’ settlements and by encouraging the discussion of a narrow, limited range of issues.¹³¹ In other words, it encourages a departure from the core features of responsiveness, self-determination and cooperation towards an emphasis on a narrow scope, reliance upon legal advisors and distributive bargaining practices.

Potential purposes of court-connected mediation

There is a choice to be made by programme providers about the extent to which the potential benefits of mediation are offered in court-connected mediation programmes. A clear definition of purpose at a programme level would clarify the aim of the mediation process.

To facilitate decision making about what courts might offer through court-connected mediation, research about what litigants value in dispute resolution provides an important guide:

¹²⁹ Macfarlane (2002), above n71, 265.

¹³⁰ Michele Herman in Alfini et al (1994), above n23, 313.

¹³¹ Wayne D Brazil, ‘Court ADR 25 Years After Pound: Have We Found A Better Way?’ (2002) 18 *Ohio State Journal on Dispute Resolution* 93. See also Bush & Folger (2005), above n87, 19; Sander (1995), above n117; Welsh (2001), above n36; Ralph Peebles, Catherine Harris and Thomas Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) *J. Disp. Resol.* 101.

While settlement is often important to litigants in dispute, research suggests that this is not what is *most* important to litigants and other participants in mediation. What is most important is the quality of the interaction at the mediation, including being respected, being understood, being able to face the other person and talk or to have questions addressed, and the responsiveness of the other person(s). What may also be important to litigants in mediation is the way their attorneys interact with each other and their appropriate responsiveness to the situation.¹³²

Research findings that contrast lawyers' and parties' perspectives of the purpose of mediation include Relis' interviews of participants in medical injury disputes in Toronto.¹³³ She found that for both plaintiffs and physician defendants, the purpose of mediation was to facilitate communication between the disputants about the circumstances around the dispute; making mediation a very personal encounter.¹³⁴ This perspective contrasted with lawyers (both plaintiff and defendant), who saw mediation as an opportunity for strategic communication to lower plaintiffs' expectations about monetary outcomes.¹³⁵ Defendant lawyers discouraged physician attendance at mediation because the dispute was only about money and the insurer, not the physician, could instruct about money.¹³⁶

Researchers have also identified a fundamental distinction between the way that legal actors and disputants evaluate mediation.¹³⁷ There is a tendency for legal actors to

¹³² Senft and Savage (2003-2004), above n46, 335 citing Robert A Baruch Bush and Sally Ganong Pope, 'Transformative Mediation: New Dimensions in Practice, Theory, and Research' (2002) 3 *Pepp. Disp. Resol. L.J.* 1.

¹³³ Relis (2009), above n72.

¹³⁴ Relis (2009), above n72, 106, 109, 194-195.

¹³⁵ Relis (2009), above n72, 194-195.

¹³⁶ Relis (2009), above n72, 106.

¹³⁷ Judith Resnik, 'Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement' (2002) *Journal of Dispute Resolution* 155; Brad Reich, 'Attorney v Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation' (2002) 2 *Southern Illinois University Law Journal* 183; Nancy Welsh, 'Stepping Back Through the

measure the success of mediation primarily on whether or not a settlement was reached and the nature of the outcome.¹³⁸ By contrast, research has consistently shown that disputants measure their satisfaction with mediation (along with all dispute resolution processes) according to their experience of the process.¹³⁹ The opportunity to participate directly is a significant part of disputants' experience of process and is discussed further at [4.2.2].

Research findings about disputants' aims in mediation highlight that the narrow, adversarial style of many court-connected mediation programmes may not be satisfying the more important interests for litigants.

An example of a mature court-connected mediation programme that has maintained a commitment to mediation benefits other than efficiency is the Saskatchewan Queen's Bench programme in Canada.¹⁴⁰ This programme was introduced in a court that was not experiencing delay. The opportunity for the parties to have a face to face meeting and the ability to adapt the mediation process on a case by case basis are emphasised in this programme.¹⁴¹

Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value' (2004) 38 *Ohio State Journal on Dispute Resolution* 573.

¹³⁸ Resnik (2002), above n137; Reich (2002), above n137; Welsh (2004), above n 137.

¹³⁹ Boule (2005), above n6, 597-598; Carol Bartlett, 'Mediation in the Spring Offensive' (1993) *Law Institute Journal* 232; Marie Delaney and Ted Wright, *Plaintiff's Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation* (1997); Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92_text.html>. For further references see Boule (2005), above n6, Ch 16 his n13 and 15. Because of such findings, many programme evaluations collect data about levels of disputant satisfaction with the mediation process. A recent example is Sourdin's examination of mediation in the Supreme and County Courts of Victoria. She found that 65% of plaintiffs would have liked to participate more and only 35% considered that they had control during the process. Sourdin (2009), above n72.

¹⁴⁰ Julie MacFarlane and Michaela Keet, 'Civil Justice Reform and Mandatory, Civil Mediation in Saskatchewan: Lessons from a Maturing Program' (2005) 42 *Alberta Law Review* 677.

¹⁴¹ Macfarlane and Keet (2005), above n140.

Despite the range of potential benefits of mediation, the way that the success of court-connected mediation programmes has been measured indicates that the benefit of efficiency is the primary institutional focus. The focus of courts on outcomes, measured by immediate short-term settlement statistics, as opposed to quality indicators, demonstrates the dominance of efficiency measures of the ‘success’ of mediation.¹⁴²

Nonetheless, it is clear that there is a range of aims that may be promoted in court-connected mediation. There are opportunities for court programmes to promote purposes of satisfaction, equality, transformation or efficiency. This is consistent with the diversity that is found within the mediation field.

3.3 Diversity in mediation practice

Like the theoretical mediation landscape, a broad range of processes may be observed to be practised under the umbrella of ‘mediation.’ There have been attempts to make sense of the diversity inherent in mediation practice by creating ‘grids’ or ‘models’ of mediation, which are discussed here.

3.3.1 Problem definition and the mediator’s role

Riskin’s work recognises that there are continuums along which different mediation processes may fall, rather than clear distinctions between homogenous groups of practice. In 1996 he attempted to organise the diversity within the practice of what is generically called ‘mediation’, according to:

- whether the problem is defined narrowly or broadly; and

¹⁴² Laurence Boulle, 'Minding the gaps: reflecting on the story of Australian mediation' (2000) 3(1) *ADR Bulletin* 3, 5.

- the role played by the mediator.¹⁴³

The range of issues that are discussed in mediation is largely dependent upon whether the problem to be discussed is defined narrowly or broadly. Where mediation takes place in the shadow of litigation, some mediators will promote the purpose of resolving the narrow legal issues as defined in the pleadings. However, other mediators will encourage the exploration of broader issues, ranging from business interests to personal, professional, relational and community interests. Discussion in a mediation conducted by a mediator with a narrow approach will focus on the strengths and weaknesses of each side's legal case and how a court would be likely to decide the issues of fact and law.¹⁴⁴ Such a narrow approach can become a preoccupation in the court-connected context, particularly when lawyers participate and mediators have a legal background.

The influence of the mediator over the scope of the problem discussed will depend upon the extent to which the mediator influences problem definition. In certain types of mediation, such as transformative and narrative, the mediator would leave it to the parties to define their problem. Other mediators are more directive about what is relevant to the mediation conversation.

Riskin represented these variables in the continuum of problem definition and grid of mediator orientations reproduced below.¹⁴⁵

¹⁴³ Leonard L. Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7.

¹⁴⁴ Riskin (1996), above n143, 19.

¹⁴⁵ Riskin (1996), above n143, Figure 1, 22 and Figure 2, 25.

FIGURE 1
PROBLEM-DEFINITION CONTINUUM

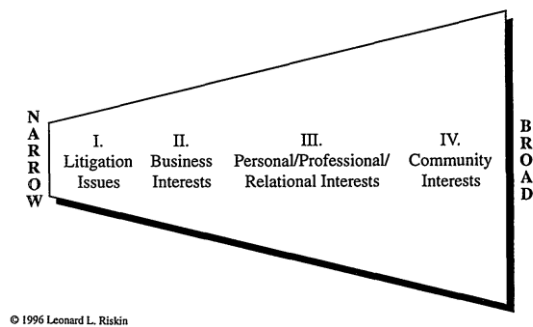
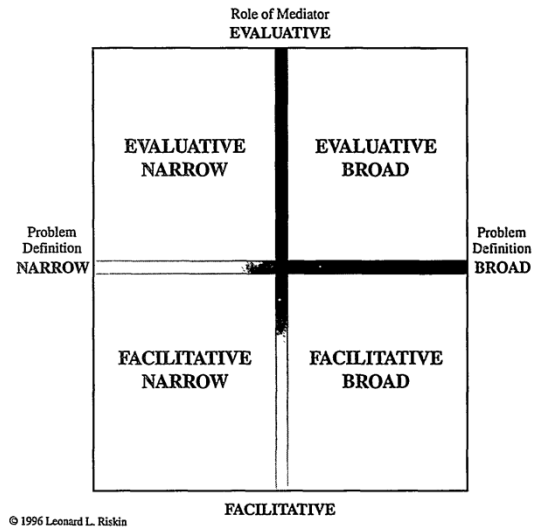


FIGURE 2
MEDIATOR ORIENTATIONS



Riskin's grid stimulated much commentary and discussion, some of which pointed to its limitations.¹⁴⁶ In 2003 Riskin elaborated on his ideas, changing the terms in Figure 2 above from 'evaluative' to 'directive' and 'facilitative' to 'elicitive.'

Directive means that the mediator draws parties toward something or away from it. Elicitive means that the mediator draws out information or perspective or influence from the parties.¹⁴⁷

However, Riskin acknowledged the limitations to the revised grid, because it assumes that mediator orientations are static, discourages attention to the roles of other participants in mediation, ignores dynamic interventions and the dimension of time.¹⁴⁸ Accordingly, he identified that other variables to be considered included:

- the pre-disposition of the mediator in relation to the balance between the influence of the mediator and other participants on individual issues;

¹⁴⁶ See for example: Kimberlee K Kovach and Lela P Love, 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* 71; Joseph B Stulberg, 'Facilitative verses evaluative mediator orientations: Piercing the 'grid' lock' (1997) 24 *Florida State University Law Review* 985; Richard Birke, 'Evaluation and Facilitation: Moving Past Either/Or' (2000) *University of Missouri Journal of Dispute Resolution* 309.

¹⁴⁷ Leonard L. Riskin, 'Who Decides What? Rethinking the grid of mediator orientations' (2003) 9 *Dispute Resolution Magazine* 22, 24.

¹⁴⁸ Riskin (2003), above n147.

- the actual relative influence of the mediator and other participants on the definition of the problem (from narrow to broad); and
- the actual relative influence of the mediator and other participants on the resolution of the problem.¹⁴⁹

Riskin's work acknowledges the influence that mediators, lawyers and parties may have on both the mediation process and outcomes. Accordingly, although practice models (described below) are helpful in understanding the diversity of the field and may also be helpful in categorising tendencies, the reality of mediation practice is much more dynamic, complex and resistant to categorisation.

3.3.2 Mediation practice models

Four broad mediation practice models have been defined by Boulle and others; namely, the facilitative, evaluative, transformative and settlement models.¹⁵⁰ Some of the differences between these models are matters of degree, while other differences reflect different underlying values.¹⁵¹ Three of the models involve problem-solving approaches to mediation and share the aim of resolving a particular dispute between the disputants. They are the facilitative, evaluative and settlement models. The transformative model focuses on relational aspects of conflict rather than problem-solving. A more detailed discussion of individual mediation models is conducted below.

¹⁴⁹ Riskin (2003), above n147.

¹⁵⁰ Boulle (2005), above n6, 43-47; Spencer & Altobelli, above n27, [5.45] – [5.110].

¹⁵¹ Spencer & Altobelli, above n27, [5.45].

Despite the fact that these are presented as distinct models, mediation practice models would not normally be expected to be observed in practice in a ‘purist’ form.¹⁵² Most mediators will employ a combination of techniques associated with more than one model within individual mediations. In practice the limitations of each model in its purist form are overcome by combining approaches. For example, a mediator who has conducted a facilitative style of mediation but who considers that a proposed settlement may be unfair to one disputant (by some external measure of fairness) might introduce some evaluative techniques to test the equality of the proposal. Another example is where facilitative techniques have been employed within a mediation and the disputants have reached a deadlock. A mediator may adopt a settlement style to assist the parties to negotiate a settlement by positional bargaining in respect of the remaining gap between them. This reality makes it inappropriate to confine expectations about mediation practice to a single practice model.

Decisions about the mediation techniques to adopt largely depend on the personal philosophy of the mediator, the preferences of the disputants or other participants and the objectives and guidelines that govern a mediation programme.¹⁵³ Mediators are influenced by their training, their acceptance of the rules governing mediation practice and their own mediation ideology.¹⁵⁴ The mediator’s past interactions with the disputants and understanding of their objectives will also influence the techniques adopted during mediation.¹⁵⁵ Other disputant related factors include their familiarity with joint problem-solving processes, the level of hostility between them, their prior

¹⁵² Birke (2000), above n146, 315; Stempel (1997), above n48, 952 & 970.

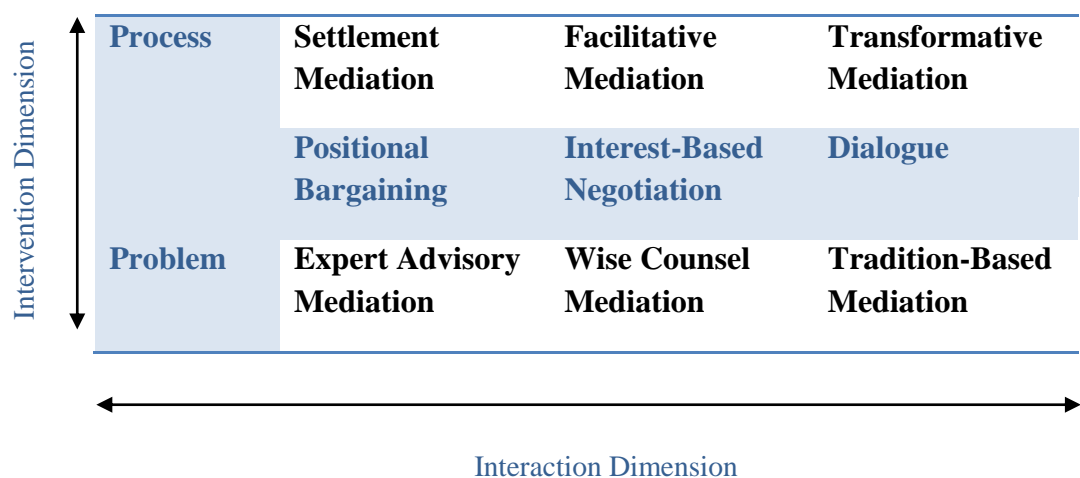
¹⁵³ Wall et al categorise the determinants governing the choice of approach to mediation as the mediator, the disputants and the environment. Wall et al (2001), above n73, 377.

¹⁵⁴ Wall et al (2001), above n73, 377-378.

¹⁵⁵ Wall et al (2001), above n73, 378.

history and the degree of trust between the disputants.¹⁵⁶ Further factors include cultural issues, time pressure and performance management pressures on the mediator.¹⁵⁷ For example, where a court-connected mediation programme aims to settle a high proportion of matters referred to mediation, the settlement style may be used to maximise the chances of reaching a settlement quickly. The typically mixed practice of mediation demonstrates the balancing of conflicting purposes that occurs in mediation practice.

Alexander has consolidated and refined pre-existing literature that defined categories of mediation practice in her ‘Mediation Metamodel,’ which comprises six contemporary practice models.¹⁵⁸ She represents these models diagrammatically as follows:



Each of Alexander's practice models are described below. Some recommendations can be made about situations in which each of the models may be appropriate.¹⁵⁹

¹⁵⁶ Wall et al (2001), above n73, 378.

¹⁵⁷ Wall et al (2001), above n73, 377.

¹⁵⁸ Nadja Alexander, 'The Mediation Metamodel: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97, 107.

¹⁵⁹ Adapted from descriptions in: Alexander (2008), above n151; Norm Brand, 'Learning to Use the Mediation Process – A Guide for Lawyers' (2000) <www.mediate.com/pfriendly.cfm?id=313> (5th February 2008); Condliffe (2008), above n2; John Settle, *The Advocate's Practical Guide to Using Mediation* (2005) Chapter 3.

Consideration can be given to the potential application of each model in the court-connected context. First, the models which focus on mediator intervention in the process are described, then the three models where the mediator intervenes in the problem (the evaluative models) are discussed.

3.3.3 Mediator intervention in the process

The settlement, facilitative and transformative models are all process oriented, although they have different aims.

Settlement mediation

In settlement mediation, positional bargaining approaches are encouraged.¹⁶⁰ The overriding aim of this kind of mediation is settlement. Parties may seek settlement for settlement's sake in order to suppress conflict and therefore avoid the distasteful experience of the dispute.¹⁶¹ Alternatively, parties may seek settlement because they cannot bear further investment in the resolution of the dispute, which may include financial, emotional, social or business costs. In the court-connected context, the aim of settlement contributes to improved access to justice for others by clearing court lists.

Incremental bargaining towards compromise is adopted to pursue the goal of quick settlement. The mediator facilitates the bargaining process, often by conveying offers between the parties, who sit in different rooms.

¹⁶⁰ Alexander (2008), above n158, 109.

¹⁶¹ Cloke (2005), above n11; See also references in [3.2.4] above.

Settlement mediation is commonly practised in court-connected mediation.¹⁶² From the point of view of courts, settlement mediation may meet their goal of improving institutional efficiency. Positional bargaining is typically culturally familiar to disputants from western culture, is relatively easy to practice and requires little preparation. It requires no deviation from a traditional adversarial negotiation between lawyers other than the presence of the clients and a mediator.

Pure settlement mediation does not necessarily promote either the satisfaction of a broad range of disputant interests or outcomes that accord with legal principles. An exclusive focus on settlement, without reference to individual preferences or external standards, does not prioritise any of the ideological purposes of mediation that were explored in [3.2] above. An obvious exception is where the only aim of the parties is to finalise the dispute by reaching a settlement. Settlement mediation is little more than a new name for ‘settlement conference’ or ‘assisted negotiation,’ informal processes that do not focus on any of the theoretical priorities of mediation. Instead, the emphasis is on efficiency alone.

Facilitative mediation

The facilitative mediation process resembles an interest-based principled bargaining negotiation.¹⁶³ It is closely aligned with the satisfaction ideology, as the overriding aim of the facilitative model is to promote the satisfaction of the parties’ needs and interests in the resolution of a dispute. Those needs and interests may include legal interests, but also include non-legal interests. Facilitative mediation is interest-based as opposed to rights-based.

¹⁶² Boulle (2005), above n6, 43.

¹⁶³ Fisher, Ury and Patton (1991), above n19.

The facilitative model emphasises the disputants' abilities to problem-solve creatively and to make decisions based on their own sense of fairness.¹⁶⁴ The mediator's role is to guide the parties through an interest-based bargaining process while striving not to intervene in the substance of the negotiations.¹⁶⁵ A broad or narrow problem definition may be adopted in the facilitative mediation model, depending upon the preferences of the individual disputants involved.

A problem with the facilitative mediation model is that when adversarial approaches are culturally dominant or disputants are unfamiliar with problem-solving approaches, they are required to develop and use skills that are uncommon and unfamiliar.¹⁶⁶ Therefore, there may be some resistance to the process imposed by the mediator. Facilitative mediation is limited by both the capacity and willingness of all disputants to engage with the facilitative mediation process. Where disputants are compelled to participate in mediation, as is the case in some court-connected mediations, it ought not be assumed that they are willing to engage with an interest-based problem-solving process, regardless of their capacity to do so.

The facilitative model also assumes that the disputants have equal bargaining power and abilities, that they can effectively control both the content and outcomes, creatively problem-solve and make fair decisions. In reality this assumption of disputant competence and equality is often rebuttable. The nature of the relationship between disputants or their relative strengths may produce imbalances that place one

¹⁶⁴ John Lande, 'Toward More Sophisticated Mediation Theory' (2000) *Journal of Dispute Resolution* 321, 325-326.

¹⁶⁵ Boulle (2005), above n6, 44-45.

¹⁶⁶ Boulle (2005), above n6, 45; Spiegel et al (1998), above n16.

at a disadvantage in negotiations. Furthermore, the disputants' emotional reactions to their conflict, their level of emotional or intellectual intelligence and their personality traits may interfere with their ability to participate constructively in interest-based problem-solving dispute resolution.

Litigated disputes have sometimes arisen from commercial or employment relationships, many litigants are seeking opportunities or outcomes that are not necessarily relevant in the formal legal system, disputes are often complex and the aim of court-connected mediation is usually to resolve the dispute and thereby bring an end to the litigation. Facilitative mediation therefore has potential to be applied in the court-connected mediation context.

Transformative mediation

Transformative mediation is one in which the focus is the conflict interaction between the parties to the dispute.¹⁶⁷ It is the model of mediation that embraces the relational rather than problem solving focus of dispute resolution. The dispute itself takes a secondary focus to the way that the parties interact with one another in relation to their conflict. The primary goals are: to transform how parties relate to one another, to redefine relationships, and to restore justice.¹⁶⁸

Transformative mediation may be appropriate when the parties are willing to invest time and effort in the exploration of their conflict interactions. It may be applied to conflicts about workplace rights and obligations, continuation or dissolution of business relationships, individual or group relationships. Although these

¹⁶⁷ Bush and Folger (2005), above n87, 18; Tom Fisher, 'Transformative mediation: differentiating principles from illusions – Part 1' (2006) 9(3) *ADR Bulletin* 44, 44.

¹⁶⁸ Alexander (2008), above n158, 115.

circumstances may often be overlooked, they may sometimes apply to disputes which are referred to a court-connected mediation process.

The question to be resolved is whether a mediation programme conducted under the supervision of the court chooses to offer a transformative model. Alternatively, parties could be referred to mediation providers outside the court's programme to participate in a transformative process if that is their preference. The decision about whether or not to offer a transformative process may be made at a programme level.

3.3.4 Evaluative models – mediator intervention in the problem

In her meta-model, Alexander breaks the evaluative model referred to in previous literature¹⁶⁹ into three models where the mediator intervenes in the problem, namely: the expert advisory, wise counsel and tradition-based models.

There has been debate within mediation literature about the legitimacy of evaluation within mediation given its conflict with interest-based approaches to dispute resolution and the priority of self-determination.¹⁷⁰ Other problems with evaluative mediation include that the basis of the mediator's opinion may be inadequate either because of the limited information on which the opinion is based or because the

¹⁶⁹ See for example: Boule (2005), above n6; Spencer and Altobelli (2005), above n27; Riskin (1996), above n143; Riskin (2003), above n147.

¹⁷⁰ See for example: ME Lafin 'Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators' (2000) 14 *Notre Dame Journal of Law, Ethics & Public Policy* 479 at 483-493 in Spencer & Altobelli (2005), above n27, [5.70]; Kovach & Love (1998), above n146; *The Practice Standards* (2007), above n60, Standard 2 (5) 'Mediation is essentially a process that maximises the self determination of the participants. The principle of self determination requires that mediation processes be non-directive as to content'; Lande (2000), above n164; Love (1997), above n75; Robert B Moberly, 'Mediator gag rules: Is it ethical for mediators to evaluate or advise?' (1997) 38 *South Texas Law Review* 669; James H Stark, 'The ethics of mediation evaluation: Some troublesome questions and tentative proposals from an evaluative lawyer mediator' (1997) 38 *South Texas Law Review* 769.

mediator lacks the requisite specialist knowledge.¹⁷¹ Furthermore, mediators who make an inaccurate evaluation may be protected by mediator immunity from being held accountable for their mistake. In court-connected mediation this has implications for both the accountability and transparency of the civil justice system.

‘Evaluative mediation’ is specifically defined as a blended process rather than falling within the understanding of ‘mediation’ adopted by the Australian National Mediation Practice Standards (‘the Practice Standards’).¹⁷² This reflects objections to evaluation in mediation. The framework of mediation outlined in the Practice Standards provides that evaluation is outside the mediator’s role unless clear consent to a blended process has been obtained from the participants, usually in the form of a written mediation agreement.¹⁷³ The Practice Standards provide that although mediators do not otherwise advise on, evaluate or determine disputes, there are circumstances in which they can provide advice to participants who seek expert information without infringing upon participant self-determination.¹⁷⁴ The Practice Standards further provide that any information given by a mediator ought to be general rather than in relation to the specific dispute.¹⁷⁵

The tensions between the mediation models that emphasise intervention in process and content parallel the tensions between the philosophies of the adversarial legal system and interest-based problem-solving theory. Litigation is about the

¹⁷¹ Boule (2005), above n6, 221; Mary Anne Noone, ‘Lawyers as mediators: More responsibility?’ (2006) 17 *Australasian Dispute Resolution Journal* 96, 97.

¹⁷² *The Practice Standards*, above n60, Standard 2(7); See also *Australian National Mediator Standards: Approval Standards* (National Mediation Conferences Limited and Western Australian Dispute Resolution Association, 2007) (‘The Approval Standards’), Standard 2(4).

¹⁷³ *The Practice Standards*, above n60, Standard 10(5).

¹⁷⁴ *The Practice Standards*, above n60, Standard 2 (5) (6) and (7).

¹⁷⁵ *The Practice Standards*, above n60, Standard 10.

enforcement of rights and entitlements, which inevitably affects mediation practice within the litigation context. It encourages evaluative elements.

The term ‘conciliation’ is generally considered to include an evaluative element when used in the Australian context.¹⁷⁶ Many courts use the terms ‘mediation’ and ‘conciliation’ interchangeably.¹⁷⁷ Most courts continue to call their court-connected consensual dispute resolution programs ‘mediation’ and do not exclude the evaluative model from the framework of court-connected mediation practice.¹⁷⁸ It is essential to consider the evaluative models when describing the diversity of mediation practice in the court-connected setting. Evaluative mediation should be acknowledged as part of the landscape of diverse mediation models.

Expert advisory mediation

The objective of expert advisory mediation is to ‘reach a settlement according to the legal ... rights and entitlements of the disputants and within the anticipated range of court, tribunal or industry outcomes.’¹⁷⁹ In order to meet this objective, an evaluation of the dispute on its legal merits is conducted within the mediation. The focus tends to be on positions and rights, so the problem is defined in a narrow and legalistic manner.¹⁸⁰ Expert advisory mediation is the facilitation of a rights-based bargaining process. The content of expert advisory mediation is defined according to objective criteria and not by the disputants’ individual interests.

¹⁷⁶ NADRAC (2003), above n76; Astor and Chinkin (2005), above n17, Chapter 3 [3.3].

¹⁷⁷ See for example *Alternative Dispute Resolution Act 2001* (Tas) s3(2).

¹⁷⁸ Kovach & Love (1998), above n146, 77.

¹⁷⁹ Boule (2005), above n6, 44.

¹⁸⁰ Alexander (2008), above n158, 108.

In order to provide appropriate advice, an expert advisory mediator should have substantial expertise in the subject matter of the dispute, knowledge of legal processes and outcomes and appropriate qualifications and experience.¹⁸¹ Mediators who have a background practising law are particularly suited to the role of expert advisory mediator, where the evaluation is sought in relation to the law.

Expert advisory mediation may be appropriate when the parties want to negotiate in terms of rights, entitlements, credibility, merits or position. It may also be applied when it is clear that the parties only need an expeditious answer to a technically complex issue, and there are no issues of continuing relationships or psychological needs. All of these circumstances may be present in the court-connected context, where the dispute has been brought into an institution that applies legal principles, the disputants often place a high priority on their legal rights and entitlements, litigants may have no pre-existing relationship and want an efficient resolution of their dispute according to legal or commercial standards. However, existing research has demonstrated that litigants often seek the satisfaction of non-legal interests through court-connected processes (see 3.2.4 above). Therefore, the context of litigation is an insufficient indicator of disputants' preferences for the narrow scope of expert advisory mediation.

Wise counsel mediation

In wise counsel mediation, the problem is defined more broadly than in expert advisory mediation. The focus is on a broader range of interests, and the mediator evaluates the case on the basis of those broadly defined legal and non-legal interests.

¹⁸¹ Boulle (2005), above n6, 44-45; *The Practice Standards*, above n60, Standard 2(7); *The Approval Standards*, above n172, Standard 5 (4).

The primary aim of this kind of mediation is access to justice in the sense of a fair forum, efficient management of conflict and the pursuit of long-term, interest-based solutions.¹⁸² The mediator assumes some kind of responsibility for the options generated and the final agreement.

Wise counsel mediation may be appropriate when the disputants want to explore a broader range of concerns than the narrow legal interests and want the mediator to provide some guidance about the resolution of the dispute. Court-connected mediators may practice this model of mediation.

Tradition-based mediation

This ancient kind of mediation is used in many traditional groups, including indigenous communities and religious groups.¹⁸³ The primary aim of tradition-based mediation is to restore stability and harmony to the community, industry or group. These mediators are usually leaders, chiefs or elders who are trusted to guide the parties to a solution that is in accordance with community norms.¹⁸⁴

Tradition-based mediation may be appropriate when parties are part of a professional, business or cultural community where group norms are more influential than legal norms.

The tradition-based model is clearly an alternative to mainstream dispute resolution options. Its applicability to the court-connected setting is therefore questionable. In mediation connected with specialist bodies, such as the Native Title Tribunal, it may

¹⁸² Alexander (2008), above n158, 112.

¹⁸³ Alexander (2008), above n158, 114.

¹⁸⁴ Alexander (2008), above n158, 114.

be appropriate to conduct a tradition-based mediation. In this thesis it is assumed that tradition-based mediation would not be conducted in connection with a court. The standards that apply are, by definition, distinct from the legal standards that form at least a frame of reference in mediation connected with the formal civil justice system.

3.4 Theory and practice in the court-connected mediation context

There is no clear theoretical framework for mediation in connection with courts. Consequently, there is scope for court-connected mediation to promote any of the theoretical purposes of mediation, including satisfaction of individual interests, equality between the parties or transformation. These purposes are likely to be tempered in the court-connected context, partly by the institutional preoccupation with efficiency.¹⁸⁵ However, efficiency is unlikely to be pursued as the sole aim of a court connected programme. In the court-connected context there will at least be some emphasis on the satisfaction of the parties' legal interests.

In the absence of clear and limiting guidelines, it is inappropriate to limit the consideration of court-connected mediation to any one particular practice model, ideology or purpose. Although some definitions of mediation limit its breadth in particular contexts, court-connected programmes typically apply broad and inclusive definitions of mediation rather than limiting definitions that confine practice to particular models.¹⁸⁶ The opportunities to embrace a range of practice models are not generally restricted by legislation, policy or programme specific guidelines. Further, no clear, limiting definition of how mediation ought to be applied to courts has been

¹⁸⁵ See [3.2.4] above.

¹⁸⁶ See [3.1.2] above.

established anywhere in theory. Flexibility is preserved, notwithstanding tendencies in practice toward a narrow problem definition, focus on settlement and priority of legal issues.

Accordingly, core features of mediation which are universal throughout the field serve as the touchstone for the examination of court-connected mediation.

4 Core features of mediation

Even though conceptualisations and models of mediation display a rich diversity, some foundational attributes of mediation can nevertheless be identified that are universal in ideologies and constructs of mediation. The extent to which these core features are realised varies infinitely between theories, practices, participants, contexts, conflicts and skill sets. Nevertheless, they remain to some degree core components of all mediation practice models and all of the purposes that may be promoted through mediation ideologies. The core features that are common within the mediation field are: responsiveness to the individual disputants, self-determination and cooperation.

Responsiveness, self-determination and cooperation have been identified as underlying values of mediation.¹⁸⁷ The idea that the people involved in a conflict will have some choice about their dispute resolution process and will have an opportunity to resolve their conflict in their own way is grounded in the value of responsiveness. The responsive capacity of mediation is derived from its inherent flexibility of both process and outcomes. Mediation provides opportunities for people in conflict to

¹⁸⁷ Boulle (2005), above n6, 60-68.

determine how they will participate in the dispute resolution process and to control the way that their conflict is resolved. The self-determinative capacity of mediation is derived from the opportunities for disputants to participate directly in the process, a degree of control over the process and ultimate responsibility for the outcome.

Cooperation is essential to mediation, where people involved in conflict are provided with an opportunity and encouraged to cooperate with one another. The structures, processes and potential outcomes of mediation provide the cooperative opportunity, notwithstanding that participants cannot be forced to cooperate.¹⁸⁸

The core features of mediation and the key opportunities linked to each of them will serve as a touchstone for the examination of court-connected mediation practice in the Supreme Court of Tasmania. The connection with the court, the participation of lawyers, the influence of legal norms and the expectations of participants all impact on the nature of court-connected mediation practice. Nonetheless, it is still appropriate for each of the features to be present in the court-connected mediation context to some degree.

4.1 Responsiveness to the individual disputants.

Responsiveness is about the tailoring of the mediation process and outcomes to meet the needs and preferences of the individual disputants. The degree to which the mediation process responds to individual circumstances will vary. However, the fundamental responsive feature of mediation is that there is an opportunity to respond to the individual disputants' interests and preferences regarding process or content in some way. In mediation there is no imposition of a strictly standard or pro-

¹⁸⁸ Boulle (2005), above n6, 63.

forma process to every case, except where there are programme-specific limitations imposed. Nor is there an obligation to resolve disputes in accordance with strict legal entitlements. These features distinguish mediation from trial processes and are shared with negotiation. In mediation and negotiation, there may be norms that develop as to the ‘usual’ way of conducting the process; however these norms may be departed from as appropriate. There is always some capacity to respond to the individual circumstances in mediation.

4.1.1 How responsiveness is common to mediation theories and practices.

Responsiveness reflects the priority of individualism over collectivism that was a stimulus to the development of the modern mediation field.¹⁸⁹ Individualism is highly prioritised in the satisfaction purpose but less of a priority in the equality or justice frameworks. In the facilitative model of the mediation process, the individual needs and interests of the parties are responded to. The settlement model responds to a perceived interest in efficiency and settlement. In the transformative context, responsiveness is focused on the relational interests of the individual participants.

The key opportunity that responsiveness presents is for the individual preferences of the participants to drive the mediation process and to influence the mediation outcomes. Responsiveness is delivered through the flexibility and informality of the mediation process and the availability of individualised outcomes.¹⁹⁰ Two statements that express the theoretical construct of responsiveness in mediation are:

- Mediation is responsive to the process needs of disputants through its flexibility.

¹⁸⁹ See the overview of the development of the field in [2] above.

¹⁹⁰ Boulle (2005), above n6, 63.

- Mediation provides an opportunity for the interests and preferences of the individual disputants regarding content to be explored and reflected in the outcome.

4.1.2 Responsive process

The mediation process is flexible because it can be adapted to suit the circumstances and needs of the individual participants. Possible variations include: regular breaks, the possibility of adjourning the process and reconvening at a future time, having the disputants physically in separate rooms, use of co-mediation, variations in the role of supporters such as legal practitioners or advocates, as well as variations in the style of negotiation that is facilitated.

The diversity inherent in mediation practice and the scope for a range of techniques to be adopted by mediators¹⁹¹ are factors that enable the process to be tailored to meet the needs or preferences promoted in individual cases. Thus, even in a mediation programme where the ‘usual’ practice is to conduct a positional bargaining styled settlement conference, a particular person may express a desire to have a different kind of dialogue that might satisfy non-monetary interests. Mediation is able to respond to such preferences. This is what sets mediation apart from more rigid and regulated processes such as arbitration, trial or pre-trial settlement conferences presided over by a judge.

There may be some limitations to the degree of flexibility of the mediation process. For example, there may be time constraints imposed by the mediation service

¹⁹¹ See [3.3] above.

provider, inadequate facilities to accommodate separate rooms or guidelines that limit the roles of participants or that restrict the style of mediation. These vary between mediation programmes. Although time constraints and the nature of facilities may impact on process responsiveness in court-connected mediation, there are usually no restrictions imposed about the style of mediation allowed to be practised.¹⁹²

4.1.3 Responsive outcomes

Mediation potentially offers disputants great flexibility in the nature of the agreements that they make, which means that outcomes can be responsive to the particular needs and interests of the disputants. In mediation, disputants are not limited to the outcomes that would be awarded by a court. Disputants may choose to apply legal or other norms to the resolution of their dispute. The legal framework may be acceptable, workable and preferable for many disputants. A defining feature of mediation is the ability to depart from those norms, depending upon the preferences of the individuals in dispute. Although the law may be highly influential, it won't necessarily determine the outcomes that disputants negotiate. Disputants may take into account business needs, non-financial considerations, the timing of payments and place value on an apology. Furthermore, disputants may choose to make 'interim' arrangements that can be tested in the short term before a final agreement is negotiated.

¹⁹² See [3.1.2] above.

There are virtually no limits to the nature of agreements that can be made at mediation, although agreements that are illegal or open to challenge on the basis of public policy are not legally enforceable.

The availability of a range of outcomes is a feature of all models of mediation.

However, in mediation where there is reluctance to explore a broad range of issues, the range of options that are generated tends to be limited. Models of mediation that encourage a narrow definition of the problem include settlement and expert advisory mediation.¹⁹³ Options are also limited where the process of option generation is not separated from the process of evaluating options.¹⁹⁴ This separation is part of interest-based, facilitative styles of mediation. The key to the delivery of responsiveness is that disputants have some control over the scope of problem-definition that is applied to their mediation.

A primary means of responding to the individual preferences of the disputants about the scope of mediation is to ensure that their individual interests and preferences regarding content are discussed during the mediation. This opens the way for them to form part of the discussion in mediation and to be responded to in some way. The individual preferences of the disputants might include having legal and non-legal interests considered or restricting the scope of the mediation to legal entitlements. Unless the parties have had an opportunity to convey their preferences about such matters, the mediation process cannot respond to them. Where the individual preferences of the disputants have not been voiced during mediation, it is doubtful that any outcome will reflect those preferences. A primary indicator of whether or

¹⁹³ See [3.3.1] above.

¹⁹⁴ Fisher et al (1991), above n19, 62-63.

not there has been an opportunity to express needs and preferences is whether or not disputants participated actively in the mediation process.

The capacity for mediation to produce responsive outcomes places it in direct contrast to the ‘limited remedial imagination’¹⁹⁵ of the legal system, which is subject to strict guidelines about the types of (generally monetary) outcomes that a court can impose. Mediated outcomes can be contrasted with trial outcomes in two main respects; namely, that the decision makers are involved in the dispute and may apply subjective criteria in decision-making and that there is a focus on the future rather than the past.¹⁹⁶ Courts are bound to apply the law uniformly to all disputes and have an obligation to treat all litigants equally. Mediation provides an opportunity for the disputants themselves to make decisions, free from any obligation to adhere to judicial decision-making boundaries. Courts have a retrospective focus and are limited to redress for past behaviours.¹⁹⁷ By contrast, in mediation there is an opportunity to focus on the future and to tailor solutions that meet future needs and preferences.

4.1.4 Responsiveness in court-connected mediation

The degree of responsiveness that is likely to be achieved in court-connected mediation is affected by the degree of informality, the prioritisation of legal standards and difficulties associated with the departure from traditional notions of justice within a public institution of justice. Each of these factors is influenced by both the court-context and the participation of lawyers in the process.

¹⁹⁵ Menkel-Meadow (1996), above n37.

¹⁹⁶ Boule (2005), above n6, 64.

¹⁹⁷ Boule (2005), above n6, 64.

Degree of informality

An aspect of flexibility in the mediation process in court-connected settings is informality.¹⁹⁸ The degree of informality of court-connected mediation varies according to subjective assessments of informality and the nature of the mediation programme. Mediation is less formal than the trial and pre-trial court processes but is more formal than direct negotiation between disputants or their lawyers. Where it is perceived that court-connected mediation replaces formal court proceedings, it is clearly a less formal process than the one it replaces. The purpose of a process that is less formal than traditional court processes is to make disputants feel comfortable and to create an environment that is conducive to open negotiations. Such benefits were mentioned in parliamentary debates about the *Alternative Dispute Resolution Bill* and are discussed in Chapter 4 [2.3].¹⁹⁹

Where court-connected mediation occurs on the court premises, it may have an air of authority that discourages participants from treating it as an informal process. This air of authority increases when the mediator is an officer of the court.

The presence of the mediator and the disputants means that court-connected mediation is generally more formal in nature than unassisted lawyer negotiation. Because lawyer negotiation has traditionally resolved the overwhelming majority of civil litigated matters,²⁰⁰ court-connected mediation may in fact replace a less formal process. Mediation is a more structured process than lawyer negotiation, offers the disputants an opportunity to participate directly and has the advantage that

¹⁹⁸ Boulle (2005), above n6, 63.

¹⁹⁹ Tasmania, *Parliamentary Debates*, House of Assembly, 21st August 2001 (Denise Swan, Deputy Leader of the Opposition), 56.

²⁰⁰ Boulle (2005), above n6, 139; Astor & Chinkin (2002), above n17, Ch 2.

participant behaviour can be monitored by the mediator. These features of mediation may be preferable to lawyer negotiation for some disputants.

The presence of ‘repeat player’²⁰¹ professional participants also impacts on the formality of court-connected mediation. Such participants include the mediator, lawyers and representatives of institutional parties. These people are comfortable and familiar with the court setting and the way the mediation process ‘usually’ proceeds. This may be daunting for other ‘one shot’²⁰² participants who are less familiar and comfortable with the mediation environment. Participants who are unfamiliar with the process may not appreciate that they could exercise some influence over the manner in which it is conducted.

Prioritisation of legal standards

Despite theoretical constructs of mediation that celebrate its freedom from legal constraints, the law plays a significant and highly influential role in court-connected mediation. Court-connected mediation generally occurs within the litigation process, when the respective legal claims have been defined and where trial is not a distant possibility. When mediation occurs within these circumstances, it is said to take place in the ‘shadow of the law’.²⁰³ The law is a relevant consideration in all dispute resolution, but is of particular influence in court-connected processes. When mediation occurs during the litigation process, a judicial decision is a realistic alternative to a negotiated settlement. Therefore, predictions about the legal outcome are a particularly important reference point for options generated in court-connected mediation.

²⁰¹ Menkel-Meadow (1999), above n50.

²⁰² Menkel-Meadow (1999), above n50.

²⁰³ Boule (2005), above n6, 143.

McEwen and Wissler note that '[t]he empirical reality of much civil court mediation appears to be firmly grounded in the context of the law and legal rights...'²⁰⁴ Most disputants in general civil disputes litigated at the Supreme Court level of jurisdiction have sought advice from and representation by a legal practitioner.²⁰⁵ By the time proceedings have been filed, litigants have strong ideas about their legal entitlements and the law may be of great importance to them.²⁰⁶ They will also have incurred legal fees in the pursuit of at least some pre-trial processes. This represents an investment in the legal outcome. Where disputant have this investment, a process that responds primarily to their legal entitlements is consistent with the principle of responsiveness. In these circumstances, the disputants may prefer that the mediation revolves around the litigated issues.

The presence of lawyers in court-connected mediation may increase resistance to any departure from the legal framework. Lawyers are very skilled at providing advice about narrow legal issues. They can assist their clients to resolve a wider range of issues. However, lawyers do not necessarily have either the skills or the inclination to encourage disputants to consider a wide range of options. Lawyers have a tendency to perceive their client's problems from a narrow lens.²⁰⁷ Riskin and Welsh have commented that:

²⁰⁴ McEwen & Wissler (2002), above n118, 133.

²⁰⁵ The Honourable Justice Pierre Slicer, 'Self-Represented Litigants' (Paper presented at the Magistrates' Conference, Hobart, Monday 14th June 2004) <www.supremecourt.tas.gov.au/publication/speeches/slicer/self-represented> at 29th May 2008. Although the number of litigants in person has increased over time, at the Supreme Court level they are still a minority of litigants in general civil cases. Only 7% of new applications at the Supreme Court of Tasmania in 2003 were made by Litigants in Person.

²⁰⁶ Nolan-Haley (1996), above n65, 64.

²⁰⁷ See discussion of problem-definition in [3.3.1] above.

...narrow problem definition is consistent with most lawyers' core interests in autonomy, a dominant role and appreciation. This problem definition also matches most lawyers' psychological preferences for the resolution of disputes based on the application of standards and rules and the avoidance of emotional issues.²⁰⁸

The tendency for lawyers to adopt a narrow view of their clients' problems is problematic, because empirical evidence has shown that clients would prefer that a broader approach was adopted (see discussion in 3.2.4 above). For example, Relis concluded that the lawyers interviewed in her investigation into medical malpractice claims perceived that plaintiffs sued for a monetary settlement.²⁰⁹ On the other hand, the plaintiffs stressed that they did not sue for money, but for a host of non-legal reasons.²¹⁰ The satisfaction of emotional or psychological needs of their clients was perceived to be a secondary or incidental mediation outcome by the lawyers.²¹¹ When lawyers misunderstand their clients' preferences in this way, responsiveness is compromised. A possible solution is for disputants to be asked directly by the mediator about their reasons for mediating.

In court-connected mediation legal experts may outnumber the disputants, for example in a two party dispute where each party brings a lawyer to mediation and the mediator is also legally trained. If the legal participants are of the view that the law is the paramount consideration, it will be difficult for disputants to steer the content of discussions in other directions. This is particularly the case when lawyers adopt a spokesperson role and speak on behalf of their clients.

²⁰⁸ Leonard L. Riskin and Nancy A. Welsh, 'Is That All There Is?: The Problem in Court-Oriented Mediation' Unpublished Paper
<http://works.bepress.com/cgi/viewcontent.cgi?article=1000&content=nancy_welsh> (20th August 2009), 67.

²⁰⁹ Relis (2009), above n72, 9-10.

²¹⁰ Relis (2009), above n72, 10.

²¹¹ Relis (2009), above n72, Chapter 4.

There is evidence of change within the legal profession, including a growing awareness of the benefits of addressing a broad range of clients' interests and more client-centred approaches to legal practice.²¹² Whatever their understanding of their clients' needs and preferences, lawyers are influential in determining the degree of responsiveness of court-connected mediation. Therefore, their perspectives are an important consideration in understanding court-connected mediation.

Courts' obligation to apply the law to disputes

A third aspect of court-connected mediation that influences responsiveness is that some difficulty may arise if non-legally available outcomes are reached within the public institution of justice.²¹³ Departing from the fundamental notion of substantive justice that underpins the adversary legal system may be problematic for courts.

Inadequate monitoring of the mediation process may leave the court open to criticism that it is promoting settlement without adequate safeguards against unjust settlement outcomes. Conversely, court-connected mediation may be open to criticism if it restricts the options that are available to disputants or stifles their creativity. Clearly, from the mediation perspective it is problematic to apply objective legal standards rigidly to assess the appropriateness of outcomes that were developed in response to the individual needs of the disputants.

Views about the departure from legal norms in court-connected mediation are likely to vary depending upon whether court-connected mediation is seen as an alternative process or merely as a means of resolving litigation efficiently. An overemphasis on

²¹² MacFarlane (2008), above n68.

²¹³ Boule (2005), above n6, 63-64. See discussion above at [2.4].

efficiency may compromise the fairness of the mediation process. An important safeguard to justice delivery is ensuring that the process of decision-making is fair (see discussion at 2.5.1 above).

The responsive capacity of court-connected mediation

The forces which detract from responsiveness in court-connected mediation decrease the likelihood that court-connected mediation will achieve the potential of reaching imaginative, tailor-made solutions through an individualised process. Instead they may promote the adoption of a pre-determined and formalised process and pursuit of outcomes that accord with objective notions of ‘fairness’. Nonetheless, even if a ‘cookie-cutter’ approach is adopted in ‘usual’ cases, there is some capacity to respond to individual disputants by adapting the process where necessary or desirable.²¹⁴ The existence of a capacity to adapt to the individual disputants is a defining feature of mediation. This opportunity is expected in the court-connected context in the absence of restrictive directives about process characteristics.

A key indicator of responsiveness is that there is an opportunity extended to disputants to define the scope of the mediation conversation. That is, to express their interests and preferences about content and thereby shape the mediation process and outcomes accordingly. The degree to which this opportunity is extended to disputants in the Supreme Court of Tasmania by mediators and lawyers is examined in this thesis.

²¹⁴ Dorothy J. Della Noce, Joseph P. Folger and James R. Antes, ‘Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court-Connection’ (2002) 3 *Pepperdine Dispute Resolution Law Journal* 11.

4.2 Self-determination

According to the National Mediation Practice Standards '[t]he purpose of a mediation process is to maximise participants' decision making.'²¹⁵ By participating in a meaningful way in the resolution of their own disputes, it is perceived that disputants can take responsibility for their own disputes and retain their dignity.²¹⁶ The consequences of self-determination are that the disputants are empowered and given responsibility for the choices that they make in relation to their dispute. Empowerment is often considered to be an essential characteristic of mediation.²¹⁷ Senft and Savage expressed this core value of mediation as follows:

...the opportunity to have an experience with conflict that is not only *not* alienating, but actually enhances human connections.

This core value of mediation comes from the alternative it promises: voice and choice, for all participants.²¹⁸

Voice is about freedom to speak freely without constraint and rules and choice is about a real opportunity to make one's own decisions about the resolution of the dispute.

Self-determination sets mediation apart from determinative processes such as arbitration and judicial decision making. In those processes, other people decide both how the dispute should be resolved and what the outcome will be. The role of the disputant in determinative processes is to persuade the third party decision-maker to make decisions in accordance with that disputant's wishes. This persuasion is usually conducted by a lawyer. The disputants compete with one another to persuade the decision-maker. They have minimal control over either the process or the outcome.

²¹⁵ *The Practice Standards*, above n60, Standard 2.

²¹⁶ Boule (2005), above n6, 65.

²¹⁷ Sourdin (2005), above n2, 28.

²¹⁸ Senft and Savage (2003-2004), above n46, 334.

Self-determination reflects the notion that mediation is about the disputants themselves deciding how to deal with their dispute, both in terms of process and outcomes. Two statements that reflect the theoretical construct of self-determination are:

- Mediation provides an opportunity for disputants to participate directly in the resolution of their dispute.
- In mediation, the disputants themselves decide how their dispute will be resolved.

4.2.1 How self-determination is common to mediation theories and practices.

In transformative mediation, the process and outcomes are self-determined. In facilitative mediation, the mediator may intervene to manage the process but will endeavour to facilitate outcomes determined by the parties. In settlement mediation, the process may be more pre-determined but there will still be some degree of voice and choice as to how the process is conducted and what information is shared. In the evaluative models, it is expected that legal or other expert issues will form part of the conversation, but it is not necessarily limited to them. In all practice models, there is some element of self-determination in the way the dispute is resolved. A particular model may be adopted because it suits the individuals involved, rather than being imposed upon them.

The degree of control that disputants have over the mediation process varies considerably in mediation practice. Some mediators facilitate preliminary negotiations about the way the mediation will be conducted. However, disputant

control is limited because most mediators are active in deciding the way that the mediation will be conducted.

Facilitative mediators are mediation and problem-solving experts whose main role is to facilitate a particular type of dispute resolution process. They steer discussions, interpret issues and guide the process. One of their tasks is to educate the disputants about problem-solving approaches to dispute resolution. The purpose of that task is to empower the disputants to better manage conflict, without the assistance of a mediator. In other words, although the facilitative mediator may be directive about the process of resolving the immediate dispute, the disputants may learn new skills that empower them to be more self-determining in the future.

By contrast, in transformative mediation processes, the mediator will be guided by the process preferences expressed by the clients.

Because their primary focus is content, mediators who practise the evaluative or settlement models of mediation do not necessarily prioritise disputant control over the process. The ‘experts’ in the objective analysis of content, whether mediators or legal practitioners, tend to be the main participants in such mediation models, meaning that there is little reference to the disputants’ individual process preferences.

Unless disputants understand that they can exercise control over the mediation process itself, they will probably accede to the process imposed by the mediator or other repeat players. Where mediation involves directive rather than facilitative intervention by a mediator, Astor and Chinkin have suggested that disputants may

‘not understand that mediation should offer a degree of control over the content and outcome of their dispute that is not possible in authoritative processes.’²¹⁹

Given the inconsistency between mediation models in relation to disputant control of process, this aspect of self-determination is not treated as a generic expectation.

However, the opportunity for direct disputant participation is treated as a generic feature relating to self-determination of process. This opportunity may be foregone by disputants who prefer to be represented by their lawyer. Nonetheless, the opportunity to participate directly may be extended in all mediation models.

Despite the different assumptions underlying the mediation ideologies,²²⁰ they share an assumption that people are fundamentally capable of resolving their own conflicts.²²¹ They also share an appreciation for the value of direct communication between humans in order to resolve conflict.²²² The mediation attribute of self-determination is promoted when disputants are given a real opportunity to participate in the mediation and to contribute to decisions about content.

4.2.2 Direct disputant participation - Self-determinative process

Disputants determine the mediation process when they make decisions about the way the process will be conducted and when they are able to participate directly. As discussed above, disputant control over the process varies within the field and is therefore not treated as a universal feature here. However, the second aspect of self-

²¹⁹ Astor & Chinkin (2002), above n17, 269.

²²⁰ See [3.2] above.

²²¹ Noce, Folger and Antes (2002), above n214, 19.

²²² Noce, Folger and Antes (2002), above n214, 19.

determination of process is direct disputant participation and this feature is promoted in all mediation processes.

The significance of direct disputant participation

Direct disputant participation promotes the disputant-centred nature of mediation and is a fundamental precursor to self-determination.²²³ Research findings have identified consistently that disputants value an opportunity to participate directly in mediation.²²⁴ For example, Welsh has confirmed procedural justice assertions that mediating parties value a dignified, thorough and even-handed process, which provides them with an opportunity to speak and an assurance that they have been heard and understood.²²⁵ Sourdin's recent study of the Supreme and County Courts of Victoria demonstrated that 59% of the disputants surveyed in those jurisdictions (65% of plaintiffs and 47% of defendants) would have liked to participate more in their mediation.²²⁶ Delaney and Wright's Australian research found that the more plaintiffs felt that they had participated in the process of resolving their claim, the greater the proportion who perceived the process as fair and the more likely they were to be satisfied with the outcome.²²⁷ Bartlett found a significant correlation between the degree to which a litigant considered he or she was able to express a point of view to the other side and the degree of satisfaction derived from the mediation process.²²⁸ The medical malpractice plaintiffs interviewed by Relis all stressed the need to be seen, heard and understood by the defence in terms of what

²²³ Boule (2005), above n6, 66; Sourdin (2005), above n2, 28.

²²⁴ Welsh (2001), above n36; Roselle Wissler, 'Court-connected Mediation in General Civil Cases: What We Know from Empirical Research' (2001-2002) 17 *Ohio State Journal of Dispute Resolution* 641, 685-686; Welsh (2004), above n130, 619; Relis (2009), above n72, 142, Chapter 2; Bartlett (1993), above n139; Delaney and Wright (1997), above n139, 50; Howieson (2002), above n139; Macfarlane and Keet (2005), above n140, 691-692.

²²⁵ Welsh (2004), above n137, 619.

²²⁶ Sourdin (2009), above n72.

²²⁷ Delaney and Wright (1997), above n139, 50.

²²⁸ Bartlett (1993), above n139.

they had been through and their present situations.²²⁹ Disputants interviewed by Macfarlane and Keet in Saskatchewan also reported favourably about the early opportunity to meet face to face.²³⁰ However, they expressed some frustration with the influence of lawyers over this opportunity.²³¹ Clearly, direct participation is valued highly by disputants.

The benefit of direct disputant participation is that disputants are encouraged to talk and negotiate directly with each other to identify their own interests, consider options and assess outcomes.²³² Disputants who participate actively in mediation have an opportunity to maximise the satisfaction of their individual needs as contrasted with those who take a passive role. Active participants contribute to the setting of the agenda for discussion and can ensure that it includes all of the issues they want raised. The interests that they have expressed can be considered in the formulation and consideration of options for resolution. On the other hand, without direct input from the disputants, the likelihood that the conversation will be about external rules or expectations rather than individual interests is heightened, because the participants who are not personally involved in the dispute tend to consider and apply external standards to its resolution.

Direct disputant participation recognises the disputants as the experts in the dispute. They are the people who have been involved in the past interactions, who experience the conflict and who have a direct and personal interest in the future. They know best what will satisfy their own needs and interests. When it is compared to direct

²²⁹ Relis (2009), above n72, 142, Chapter 2.

²³⁰ Macfarlane and Keet (2005), above n140, 691.

²³¹ Macfarlane and Keet (2005), above n140, 691-692.

²³² Boule (2005), above n6, 65.

negotiation between disputants, the degree of direct disputant participation in mediation is limited by the participation of others, including mediators and legal practitioners. When disputants rely on professional representation, the professionals often take on the role of expert and contribute an 'objective' perspective of the dispute. In mediation that is driven by legal practitioners the mediation process may provide little opportunity for direct disputant participation because the disputants are reliant on professional assistance. The impact of legal representation on self-determination depends upon the nature of the lawyer-client relationship.

If the value of self-determination is promoted, then the opportunity for disputants to participate directly in the mediation process should be real, notwithstanding that some will prefer to rely upon professional representation. In some contexts, the potential for lawyers to dominate in mediation is avoided by excluding lawyers from the process.²³³ Some mediators seek to minimise reliance on professional assistance by insisting on direct disputant participation and an advisory as opposed to advocacy role for professionals.²³⁴

Qualifications to direct disputant participation

There are a number of problems with the expectation that all disputants will participate directly in mediation. The promotion of direct disputant participation without qualification ignores questions about whether particular individuals have the

²³³ For example, lawyers are excluded from mediation at Australian Family Relationship Centres. Australian Government, Attorney-General's Department, *Operational Framework for Family Relationship Centres* (2007), p 11.

²³⁴ Micheline Dewdney, 'Party, Mediator and Lawyer-driven problems' (Paper presented at the 8th National Mediation Conference: No Mediator is an Island, Hobart, 2-5 May 2006); Micheline Dewdney, *Party, Mediator and Lawyer-Driven Problems and Ways of Avoiding Them* (2007) LEADR <www.leadr.com.au/articles> at 25 June 2007; Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (2nd ed, 2004).

capacity to participate directly, whether it is appropriate that they do and whether they want to.²³⁵ Some disputants may not have the communication skills or the intellectual or emotional capacity to present their own interests properly in mediation. Sometimes the relationship between the disputants may be such that there is a power imbalance that may be exacerbated if the disputants negotiate directly with one another during the mediation process.²³⁶ Where disputants have engaged legal representation, they may prefer that their lawyers promote their interests on their behalf. Although self-determination may theoretically promote disputant responsibility, some disputants may prefer not to take responsibility for the resolution of their dispute.

Where it is inappropriate or undesirable for disputants to participate directly, their interests may be communicated by another person such as an advocate or legal practitioner. The extent to which the disputants contribute to the mediation process then becomes dependent upon the nature of the relationship between the professionals and their clients. The style of representation adopted by legal practitioners who speak for their clients in mediation varies, depending upon their view of the self-determinative potential of mediation and the importance of their clients' subjective interests as opposed to their legal interests.

Although the degree of direct disputant participation is affected by other participants in the mediation, some degree of disputant participation is expected across all mediation ideologies and processes.

²³⁵ Astor & Chinkin (2002), above n17, 159.

²³⁶ Astor & Chinkin (2002), above n17, 160-163.

4.2.3 Self-determination of outcomes

Self-determined outcomes are pursued through disputants' input into the content of the mediation and assent to the final agreement. Disputants determine the content of mediation when they decide what is relevant to the discussion, they understand what is being said, they formulate solutions and agree to the outcomes.²³⁷ These features of mediation are maximised when mediation is focused on the individual needs and preferences of the disputants, such as in facilitative and transformative mediation. They are expected to be present in some degree in all kinds of mediation. When disputants determine the content of discussions they are treated as the experts in their own dispute. The aim is to ensure that they are committed to the outcomes of mediation because they have formulated those outcomes themselves.²³⁸

The benefits of disputants' contribution to content

Disputant contribution to the content of mediation may expand the range of issues that are discussed. If disputants determine the scope of discussions, they may decide that they wish to discuss matters that legal participants may not have considered relevant to the immediate dispute. For example, in a dispute between divorcing spouses, one disputant may wish to discuss the way that the other person's behaviour has affected them. This may not be legally relevant to the division of property between the disputants, but communicating about it may provide psychological benefits and enable the person to focus on the pursuit of an agreement in relation to the future.

²³⁷ Boulle (2005), above n6, 65.

²³⁸ Boulle (2005), above n6, 65.

Disputant input into the content of discussion also opens the way for some redefinition of relationships between the parties. This may be relevant even where the parties are not expected to continue their previous relationship.

Illustrative example:

Redefinition of relationships through direct disputant participation

For example, where a personal injuries action has been brought by an employee, who will not be able to return to work, against an employer, there is no continuing relationship. The employer may want to talk about the employee's work history prior to the injury, to emphasise that the employee was considered to be a dedicated and hardworking member of the workplace team. A conversation along these lines may have a cathartic benefit. It may assist in improving relationships that have broken down since the injury. An employer may feel affronted by allegations of negligence, or guilty about an injury having been suffered by an employee at work. The employee may feel awkward about a legal claim of negligence being made against an employer with whom she or he had a productive working relationship, or may feel resentful about circumstances leading to the injury. These kinds of emotions impact on the relationships between parties to a workplace dispute and may present an obstacle to the achievement of a monetary solution unless there is a chance for these emotions to be aired.

From the legal perspective, shared by lawyers and legally trained mediators, a conversation between an employer and injured worker may be regarded as being undesirable if it is not directly relevant to the legal issues or may damage the strength of particular claims that have been made by the parties. There may be a conflict

between the disputants' desire to discuss a wide range of issues and the legal perspective of the proper scope of negotiations.

Where disputants are active in the generation of options within mediation, they may have more commitment to the outcomes that are reached. Disputants may formulate their own solutions with the assistance of expert legal advisors or with reference to external standards. Where solutions are suggested by the mediator or by the legal practitioners who participate in mediation, then the disputants may become somewhat distanced from the decision making process. Furthermore, where the focus is on exterior criteria for framing the issues or determining outcomes, such as in the evaluative or settlement mediation models, the extent to which disputants determine the content is limited. However, it is important to note that an eclectic mix of mediator interventions have been found to be acceptable to disputants, provided that they perceive that the mediator's behaviour is procedurally fair.²³⁹ Therefore, mediators and lawyers can influence the content of mediation without necessarily impinging upon disputant self-determination.

Mediators are influential in determining how much of an opportunity disputants have to contribute to the content of the mediation discussions. In facilitative and transformative mediation the mediator may strive to minimise his or her influence over the subject matter but will provide some assistance to the disputants in identifying the issues between them. Mediators influence the content of mediation by making judgments about when to steer discussions in a particular direction, by interpreting the issues or otherwise making decisions based on their own

²³⁹ Welsh (2004), above n137.

interpretation of what has been said.²⁴⁰ On the other hand, a mediator who evaluates has a direct and substantial impact on the content of the dispute. Ultimately every mediator has some degree of control over the opportunity that disputants have to influence the content of the mediation.

Agreement is required for any mediated outcome

The minimum standard of self-determination of content that is achieved in mediation is that disputants must agree to any outcomes. This distinguishes mediation from determinative processes. However, there are a variety of reasons why disputants might agree to a settlement proposal. Those reasons range from free and willing agreement to reluctant acceptance of defeat, which does not prioritise self-determination.

A number of coercive pressures may be felt by disputants participating in mediation. For example, where one disputant has more effective persuasive skills, a less confident disputant may feel coerced into agreement. Alternatively, if a legal practitioner wants his or her client to settle on particular terms, the opinion of the mediator may be sought to provide a ‘reality check’ to the disputant.²⁴¹ In such circumstances a disputant may be persuaded to accept a settlement offer by both the mediator and legal practitioner. Furthermore, advice from a mediator may influence a disputant’s decision whether or not to agree to a proposed outcome. Such persuasive influence on a disputant by a lawyer or mediator promotes settlement and is efficient but does not maximise self-determination.

²⁴⁰ See Astor & Chinkin (2002), above n17, 151; A Taylor, ‘Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence and Transformative Process’ (1997) 14 *Mediation Quarterly* 215 at 228 in Spencer & Altobelli (2005), above n27, 170.

²⁴¹ Thompson (2004), above n111, 533.

Coercion in mediation also compromises the procedural fairness of the mediation process (see 2.5.1 above). The Australian National Mediator Practice Standards provide that procedurally fair mediation outcomes are those that are reached by free agreement of the disputants with informed consent, that are not influenced unduly and the feasibility and practicability of which have been tested.²⁴² Furthermore, the mediator should neither apply pressure on disputants to settle nor make a substantive decision on behalf of any participant.²⁴³

4.2.4 Self-determination in court-connected mediation

The opportunities that mediation presents for self-determination may be encouraged by mediators, but the impact is limited by the dynamics of lawyer-client relationships. Interrogation of lawyer-client relationships provides some indication of the degree of self-determination that is achieved in court-connected mediation. At the very least, disputants have an opportunity to instruct their legal representatives and to decide with them about the degree of their participation and the content of discussions.

Court-connected mediation carries an aura of authority, particularly where it is conducted on the court premises, the mediator is an officer of the court and the disputants' legal advisors control the mediation process. The consequence of this aura of authority is that any input in the process or content by the mediator or legal practitioners may be highly persuasive, no matter how tentative it may be. Any

²⁴² *The Practice Standards*, above n60, Standard 9 (1) and (7).

²⁴³ *The Practice Standards*, above n60, Standard 9 (8).

increase in the control of mediation by participants other than the disputants impacts on the degree of disputant control.

When mediation is court-connected the influence of the external standard of legal norms also impacts on disputants' self-determination of the content of mediation. The prioritisation of legal norms may reduce the importance of the individual needs and interests of the disputants regarding outcome. The focus becomes those objective standards in relation to which few disputants are experts.

The maximisation of self-determination means that disputants should enter into agreements with full knowledge of the alternative outcomes that they are foregoing (see 2.4.2 above). Nolan-Haley argues that if disputants have legal knowledge when they make consensual decisions, then the outcomes to which they agree have been reached in circumstances of fairness and justice,²⁴⁴ otherwise '...the exercise of self-determination is simply a feel-good process.'²⁴⁵

Because disputants' perceptions of fairness are affected by the degree to which parties feel that they have had an opportunity to express themselves in a dispute resolution process (see 4.2.2 above), the extension of an opportunity to participate is a means of satisfying the courts' obligations to the administration of justice. Welsh argues that to deliver procedural justice in court-connected mediation, disputants should be encouraged to attend court-connected mediation in person and should have an opportunity to speak, including to share their story with the other party.²⁴⁶ In many court mediation programmes, including the Supreme Court of Tasmania,

²⁴⁴ Nolan-Haley (1996), above n65, 90-92.

²⁴⁵ Nolan-Haley (1996), above n65, 87.

²⁴⁶ Welsh (2001), above n36, 858.

parties with authority to settle the litigation are ordinarily required to attend mediation in person.²⁴⁷ There is no prescription that an opportunity to participate ought to be offered to disputants.

The self-determinative potential of court-connected mediation is affected by the nature of lawyers' relationships with their clients. There is some evidence that in court-connected mediation lawyers often dominate the discussions to the exclusion of their clients or request that their clients do not speak or participate in discussions.²⁴⁸ The traditional lawyer-client relationship is one of expert-naïf.²⁴⁹ Lawyers control the way that their clients' cases are conducted through pre-trial and trial processes. This model encourages parties to rely upon their lawyer to speak on their behalf rather than participating directly. Alternative, emerging models of lawyer-client relationships promote greater client control and participation.²⁵⁰ These relationships are managed collaboratively by lawyers and their clients.

Several studies have found that parties' assessments of the fairness of mediation are more likely to be positive if their lawyers prepare them for mediation.²⁵¹ For example, Macfarlane and Keet found that clients reported not only feeling inadequately prepared for mediation, but also offered ideas about what adequate

²⁴⁷ *Supreme Court Rules* 2000 (Tas) Part 20 Rule 519(4) 'Unless otherwise ordered or agreed by the parties, each party is to attend the mediation with authority to settle.'

²⁴⁸ Elizabeth E Gordon, 'Why Attorneys Support Mandatory Mediation' (1999) 825 *Judicature* 224, 227; Joel Gerschman, 'Pilot Study Examines Lawyer's Roles in VCAT Mediations' (2003) 7 *VCAT Mediation Newsletter* 7, 9; Senft and Savage (2003-2004), above n46, 336; Welsh (2001) above n36; Nancy Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice' (2002) 2002 *University of Missouri Journal of Dispute Resolution* 179.

²⁴⁹ Chiara-Marisa Caputo, 'Lawyers' Participation in Mediation' (2007) 18 *Australasian Dispute Resolution Journal* 84; MacFarlane (2002), above n71, 248; MacFarlane (2008) above n68.

²⁵⁰ MacFarlane (2008), above n68.

²⁵¹ Delaney and Wright (1997), above n139, 66; Wissler (2001-2002), above n224, 687; Bobbi McAdoo and Nancy Welsh, 'Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation' (2004-2005) 5 *Nevada Law Journal* 399, 424.

preparation would involve.²⁵² It is therefore pertinent to investigate the approach that lawyers take in preparing their clients for mediation when considering the extent of self-determination achieved in the court-connected mediation process. This data complements observations about the extent of direct disputant participation in joint mediation sessions. In Chapter 5 lawyers' reports about the way they prepare their clients for mediation are analysed.

In the court-connected context, the extension of an opportunity for disputants to be directly involved in the mediation process is a primary indicator of self-determination. This opportunity is fundamental to the mediation process. Some disputants may prefer that their legal representatives take an active role in the mediation process. However, the core feature of self-determination is that disputant preferences drive decisions about participation. Research has identified a tendency for direct disputant participation to be discouraged in court-connected mediation.²⁵³ This demonstrates a departure from the core mediation feature of self-determination. The degree to which the opportunity to participate directly in the process is realised within the court-connected mediation programme at the Supreme Court of Tasmania is examined in this thesis.

²⁵² The preparation tasks that these clients wanted are outlined in Chapter 5 [3.2]. Macfarlane and Keet (2005), above n140, 693.

²⁵³ See for example: Sourdin (2009), above n72; Christine Chinkin and Micheline Dewdney, 'Settlement Week in New South Wales: An Evaluation' (1992) 3 *Australian Dispute Resolution Journal* 93; Relis (2009), above n65; Clarke, Ellen and McCormick (1995), above n65. Cf. mixed practices observed in Professor Dame Hazel Genn, Professor Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vencappa, 'Twisting arms: court referred and court linked mediation under judicial pressure' (Faculty of Laws, University College London, University of Nottingham Business School, 2007); Wissler (2001-2002), above n224, 641.

4.3 Cooperation

The promotion of cooperation and non-competitive approaches to dispute resolution is a core feature of all mediation processes. Mediation is a consensual process and therefore relies upon some degree of cooperation between the parties. It can provide a setting in which parties can practice cooperative behaviours with the assistance of the third party mediator, who may be able to moderate competitive tactics.

Although mediation encourages cooperative approaches to dispute resolution, sometimes the participants may choose to participate in a competitive manner. One of the biggest challenges for mediators is to overcome entrenched adversarial cultures of dispute resolution and to succeed in fostering a cooperative attitude in participants. As noted by Menkel-Meadow,

The orientation (adversarial or problem-solving) leads to a mindset about what can be achieved (maximising individual gain or solving the parties' problem by satisfying their underlying needs) which in turn affects the behaviour chosen (competitive or solution searching) which in turn affects the solutions arrived at (narrow compromises or creative solutions).²⁵⁴

Therefore there are limitations to the degree of cooperation that may be realised in mediation. It ultimately depends upon the willingness of the participants to participate cooperatively.

Notwithstanding that sometimes participants may choose to be competitive in mediation rather than cooperative, the defining feature of mediation is the extension of an opportunity to cooperate. Cooperation may be promoted through both the

²⁵⁴ Menkel-Meadow (1984), above n25, 760.

mediation process and outcomes. Two statements that reflect the theoretical construct of cooperation are:

- Mediation provides an opportunity for non-competitive approaches to dispute resolution to be adopted.
- Mediation outcomes are agreed between the parties.

4.3.1 How cooperation is common to mediation theories and practices.

The structures of mediation are designed to encourage disputants to adopt a cooperative approach to the resolution of their dispute. These include the assistance of a third party who facilitates communication and a process that encourages open sharing of information. Mediation also relies on cooperation by all participants in order to deliver benefits such as responsiveness and self-determination. If participants do not engage with the mediation process, then mediation is unlikely to deliver these benefits.

A degree of cooperation is required in all mediation practice models and mediation ideologies. Competition is discouraged in most forms of mediation, perhaps excluding the settlement and expert advisory mediation models. Settlement mediation facilitates a positional bargaining style of negotiation, which by its nature is adversarial. Expert advisory mediation involves predictions about the likely legal outcome being made by the mediator, based on arguments and positions as stated by the participants. The presentation of opposing arguments to a third person may mirror the adversary decision-making style of judicial determination, although sometimes the expert advisory model may be approached with a cooperative manner of presenting each party's perspective of the standards that apply to the dispute. Even

within these more competitive mediation models, the process relies on the parties cooperating in the sense that they are trying to convince one another to compromise in some way. Without cooperation, the mediation process would not resolve disputes. In the settlement and expert advisory models the aim of the process is to resolve the dispute, so settlement rates are a measure of success. In transformative models, the primary aim is to cooperatively explore the interactions between the parties to achieve empowerment and recognition. Cooperation is therefore a fundamental feature of all mediation models.

Cooperation is promoted in mediation through some process characteristics and by the cooperative nature of mediation outcomes.

4.3.2 Cooperative process

Mediation encourages a cooperative process because disputants can speak freely to each other and because they work together to reach mutually agreeable outcomes. The mediator's role is to facilitate dialogue between disputants.²⁵⁵ The nature of that dialogue may be restricted only by the mediator's insistence on respectful communication. The presence of the mediator provides some safeguard to the disputants that they will have an opportunity to express their point of view or grievances. This may provide an incentive to listen to one another without interruption.

The degree to which the mediation process can be described as cooperative depends upon the approaches of the participants. In particular, the degree of trust that either

²⁵⁵ Carrie Menkel-Meadow, 'Access to Justice: The Social Responsibility of Lawyers: When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering' (2002) 10 *Washington University Journal of Law and Policy* 37, 42.

pre-exists or can be built during the mediation process will impact upon the openness of communications.

There are some limitations to the extent of confidentiality that applies to mediation, which are particularly relevant when mediation is conducted within the context of litigation.²⁵⁶ These may reduce the incentive to approach mediation with full openness and cooperation. Commentators have concluded that mediators ought to avoid overstating the degree of confidentiality provided by the mediation process²⁵⁷ and that legal practitioners ought to warn their clients of the use to which information they disclose at mediation may be put.²⁵⁸ However, qualified assurances about confidentiality could frustrate one of the functions of mediation, which is 'to encourage parties to speak candidly about their interests, needs, fears and desires.'²⁵⁹ If parties have concerns about the potential consequences of speaking candidly during mediation, they may be more likely to withhold information, which does not encourage the openness required for full cooperation.²⁶⁰

4.3.3 Cooperative outcomes

Outcomes that are reached at mediation must be consensual, which requires at least a minimal degree of cooperation. However, truly cooperative solutions are acceptable

²⁵⁶ Rachael Field and Neal Wood, 'Confidentiality: An ethical dilemma for marketing mediation?' (2006) 17 *Australasian Dispute Resolution Journal* 79; Vicki J Vann, 'Confidentiality in Court-Sponsored Mediation: Disclosure at Your Own Risk?' (1999) 10(3) *Australasian Dispute Resolution Journal* 195, 199; *Williamson v Schmidt* [1998] 2 Qd R 317 at 331-333 citing *AWA Ltd v Daniels* (Unreported, Supreme Court of New South Wales, Rolfe J, 18th March 1992) and applying *Field v Commissioner for Railways of New South Wales* (1957) 99 CLR 285.

²⁵⁷ *The Practice Standards*, above n60, Standard 6 (3), provides that mediators ought to inform the participants of the limitations of confidentiality.

²⁵⁸ Vann (1999), above n255, 203; Geraldine Dann, 'Confidentiality After Unsuccessful Court-Ordered Mediation : Exemplary or Illusory?' (1996-97) 3 *Commercial Dispute Resolution Journal* 212; Melinda Shirley and Wendy Harris, 'Confidentiality in Court-Annexed Mediation - Fact or Fallacy?' (1993) 13(6) *Queensland Lawyer* 221, 223; Field and Wood (2006), above n262.

²⁵⁹ Shirley & Harris (1993), above n257, 223.

²⁶⁰ Shirley & Harris (1993), above n257, 223.

to both disputants and are made freely. Factors which may impede this include: excessive pressure applied by one participant (party, lawyer or mediator) towards another, barriers to practical access to alternative dispute resolution mechanisms such as trial (for example, where a party cannot bear the financial cost of a trial), or where agreements are reached without adequate information upon which to assess the reasonableness of the settlement terms.

Mediation also has the potential to provide a collaborative experience. Disputants may leave mediation with a balanced understanding of both perspectives of the dispute. It can be a cooperative process in which the disputants collaborate in identifying and exploring their issues and inventing options. This may improve their understanding of each other, of the dispute, of conflict generally and may also enhance their conflict management skills for the future. These types of outcomes are the result of a satisfying cooperative experience. They cannot be measured and may not be consciously recognised by participants.

4.3.4 Cooperation in court-connected mediation

Theoretically, court-connected mediation provides a cooperative alternative to the competitive approach that is encouraged in the adversary legal system. However, because of the conflict between competitive and cooperative structures of decision-making, there are mixed messages presented to participants in court-connected mediation about the appropriate approach to the process.

Advantages and disadvantages of cooperation and competition

There are both advantages and disadvantages to cooperation in court-connected mediation. Cooperative approaches may promote a disputant centred approach to dispute resolution because willingness to cooperate demonstrates some degree of concern for the other party. Cooperation, by encouraging dialogue, may increase the satisfaction of all participants when having a voice and being heard are valued.

Cooperation may also be more efficient than adversarial approaches. Cooperation opens communication and enables the disputed issues to be narrowed by identifying areas of agreement. It may result in earlier resolution. However, sometimes the sharing of perspectives is a time consuming process and takes more time than an adversarial negotiation of narrowly defined issues. Once litigants have incurred substantial legal costs it may be financially advantageous to proceed to trial rather than to compromise their claim. Furthermore, there may be some risk of exploitation by the other side if a cooperative approach is adopted by one party only. The risk of unfair terms of settlement may be prevented if the parties are mindful of the alternatives to a negotiated outcome and rigorously assess settlement proposals against them. The risk of mediation being used for a collateral purpose may be avoided by assessing the willingness of the other side to engage with the mediation process. An alternative response is to be secretive and to avoid sharing information during mediation, a typically competitive approach.

There are also advantages and disadvantages of adversarial approaches to court-connected mediation. One perceived advantage of the adversarial approach is that it preserves the strengths of the client's case for trial. For litigation lawyers who see trial as the ultimate outcome of litigation, the importance of protecting the legal case

for trial may be magnified. The adversarial approach may also achieve a sense of victory over the other side if they do not have the stamina to resist positional demands. Such a benefit may be attractive to some litigants. The adversarial approach can be inefficient because it maintains secrecy and discourages open cooperation. This may cause the process to become protracted, increases the potential for misunderstanding and can result in the development of unnecessary conflict. Furthermore, in litigation parties are required to discover their case pre-trial, so the perception that the case ought to or can be preserved for trial is somewhat artificial.

The impact of compulsion

The compulsory nature of mediation impacts upon its cooperative potential. In the private sphere, disputants agree to participate in the mediation process and this voluntariness has been asserted to be a necessary attribute of mediation, because it means that the disputants are free to decide how their dispute will be dealt with and also ensures their commitment to the process.²⁶¹ Astor has raised the question whether an outcome reached at mediation where a disputant did not voluntarily participate in the process can be truly consensual.²⁶² It may not be clear to some parties that it is participation, not agreement to an outcome that is compelled. The likelihood of such a misunderstanding is heightened where a mediator offers an opinion about an appropriate way to resolve the case. As with many foundational characteristics of mediation, theory has not resolved the debate about the erosion of consensus in mediation practice and the ‘principle is subsumed to the pragmatic.’²⁶³

²⁶¹ Astor & Chinkin (2002), above n17, 158.

²⁶² Spencer & Altobelli (2005), above n27, [5.115] citing Hilary Astor, ‘Rethinking Neutrality: A Theory to Inform a Practice’ Part 1 (2000) 11 *Australasian Dispute Resolution Journal* 73.

²⁶³ Spencer & Altobelli (2005), above n27, [5.160].

The pragmatic interest that is promoted by mandating referral to mediation is the encouragement of early settlement of litigation. Legislative reforms that grant courts the power to refer matters to mediation either with or without the consent of the parties 'reflect a view that mediation may be productive even if a party is initially a reluctant participant.'²⁶⁴ There is some evidence that compulsion to participate in court-connected mediation has no statistically significant impact on settlement, meaning that many disputants are persuaded to compromise even if they do not choose the process freely.²⁶⁵

The degree of compulsion to mediate depends on many variables, including the legislative and policy framework of each court or organisation.²⁶⁶ When a court has the power to order disputants to participate in mediation, the mere existence of that power will influence the decision to agree to participate in the process. Furthermore, when a court official suggests that mediation might be appropriate, many disputants will agree to participate in the process on the basis of that recommendation.

Where participants have been compelled to attend mediation, they are less likely to be committed to a problem-solving, cooperative process. Individuals who are attracted to that style of dispute resolution process would probably have volunteered to participate. Instead, the mandatory mediation process often becomes positional or rights based.

²⁶⁴ *Australian Competition and Consumer Commission v Lux Pty Ltd* [2001] FCA 600 (Unreported, Nicholson J, 24th May 2001) at [27].

²⁶⁵ Douglas Henderson, 'Mediation Success: An Empirical Analysis' (1996) 11 *Ohio State Journal on Dispute Resolution* 104.

²⁶⁶ Tania Sourdin, 'Making People Mediate. Mandatory Mediations in Court-connected Programmes' (1993) in Spencer & Altobelli (2005), above n27, 147. Other variables include the attitudes of the local judiciary and legal profession towards referral to mediation, the manner in which policies are enforced and the confidence of individual disputants to resist or request a referral to mediation.

Lawyers' negotiation styles

The way that lawyers tend to negotiate also impacts on the cooperative potential of court-connected mediation. Lawyers tend to negotiate in a positional rather than in a problem-solving or collaborative way.²⁶⁷ Mediation has provided an opportunity for some lawyers to make changes to the way that they conduct settlement activities.²⁶⁸ Others express a preference for problem-solving approaches even if that differs from their experiences.²⁶⁹

Ultimately, the capacity for court-connected mediation to be a cooperative process and to achieve cooperative outcomes is dependent upon the willingness of the participants to behave cooperatively. This may depend upon both individual and cultural factors. For example, some people prefer to use power in negotiations to try to gain an advantage over another person. Adversarial negotiation styles, including 'take it or leave it' offers, may be a defensive tactic when a person does not have confidence in their ability to negotiate in another way.

Notwithstanding the fact that some people will choose to adopt non-cooperative tactics, mediation always provides an opportunity to cooperate. This opportunity is present when competitive approaches to mediation are discouraged and mediators support cooperative approaches. Evidence of competitive and cooperative

²⁶⁷ Jonathon Hyman in Alfani et al (1994), above n23, 323-324; MacFarlane and Keet (2005), above n140; Menkel-Meadow (1984), above n25.

²⁶⁸ MacFarlane (2002), above n71; MacFarlane (2008), above n68; Craig A. McEwen, Nancy H. Rogers and Richard J. Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 *Minnesota Law Review* 1317.

²⁶⁹ Hyman in Alfani et al (1994), above n23, 323-324.

approaches will be sought from the Supreme Court of Tasmania's mediation programme.

4.4 Key opportunities that are presented in mediation.

The core features of mediation identified in this chapter are common to all theories and practices of mediation, although the extent to which they are present in different contexts varies considerably. This thesis analyses the degree to which responsiveness, self-determination and cooperation are realised in court-connected mediation in the Supreme Court of Tasmania. It is expected that the realisation of these core features is tempered by the litigation context and the participation of lawyers. The discussion of each of the core features above concluded that some element of each can be reasonably expected to be observed in the court-connected context.

The extent to which court connected mediation at the Supreme Court of Tasmania achieves the potential of mediation will be tested by reference to the following indicators that were identified above:

- Mediation provides an opportunity for the interests and preferences of the individual disputants in regard to content to be explored. This is the indicator of responsiveness tested in the Supreme Court of Tasmania's programme.
- Mediation provides an opportunity for disputants to participate directly in the resolution of their disputes. This is the indicator of self-determination tested in the Supreme Court of Tasmania's programme.

- Mediation provides an opportunity for non-competitive, co-operative approaches to dispute resolution to be adopted, which indicates the degree of cooperation that is achieved.

These indicators are expressed as opportunities in keeping with disputant choice, a fundamental feature of mediation. Disputants may choose to forego any of these opportunities. The delivery of responsiveness, self-determination and cooperation requires that each opportunity is offered to the disputants, so that their own preferences can guide the process.

The discussion so far has demonstrated that each of these key opportunities might be expected to be reduced to a degree in the court-connected context. First, the opportunity to consider the disputants' interests and preferences about content may be affected by time constraints, agenda setting by non-disputants, the impact of repeat players, the presence of lawyers and the legal context. Secondly, the opportunity for disputants to participate directly in the mediation process may be affected the influence of lawyers or mediators, the priority of legal issues, the capacity and willingness of the disputants to participate and the formality of court-connected processes. Thirdly, the opportunity to adopt non-competitive approaches to dispute resolution may be affected by resistance to cooperation within a legal system that is built on competitive principles. Notwithstanding these limitations, court-connected mediation can deliver responsiveness, self-determination and cooperation to some extent. This thesis examines the extent to which these core features are achieved in the Supreme Court of Tasmania.

5 Conclusion

This Chapter has addressed the first research question that was posed on page 1: ‘What is possible within court-connected mediation?’ The possibilities have been identified from the investigation of the breadth of the mediation field and consideration of whether the core features of mediation may be realised within the context of court-connected mediation.

The concept of mediation encompasses a diverse field of practices and ideologies about the way that people can respond to conflict. From that diversity there are three core features that are common to all mediation theories and practice models. The common features are: that mediation responds to the individual disputants involved, promotes self-determination and encourages cooperation. The extent to which these core features are promoted does vary enormously, but some element of each can be expected in every mediation process.

Court-connected mediation is not restricted to particular theoretical notions of mediation. Nor is it appropriate, in the absence of restrictive programme guidelines, to restrict court-connected mediation to any particular practice model. There is scope for court-connected mediation to pursue a range of purposes and for a range of practice styles to be adopted. There are many opportunities presented by court-connected mediation, whether or not they are embraced by the participants. For example, court-connected mediation may be a vehicle for: satisfying some legal and non-legal interests of the parties, resolving disputes in accordance with the law, achieving early and cost-effective outcomes for the parties, or redefining the

relationship between the parties. The mediator's role may include: facilitating communication between participants, managing the process, providing opinions about likely legal outcomes, reality testing the alternatives to a consensual outcome, proposing ways to settle the dispute, and convincing parties about the weaknesses in their legal cases.

However, the tensions between mediation and the legal system create a dilemma for court-connected mediation providers. The way that programme providers and lawyers respond to the dilemma impacts upon the realisation of responsiveness, self-determination and cooperation. Some of the questions that can be asked of court-connected mediation are:

- Will the problem be defined narrowly, in terms of the legal issues, or will there be an opportunity to define the problem broadly? The way that this question is resolved impacts upon the degree of responsiveness that is realised through the opportunity to explore a range of disputants' interests.
- What are the appropriate roles of lawyers and clients in mediation? The way that this question is resolved impacts upon the degree of self-determination that is realised through the opportunity to participate directly.
- Will competition or cooperation be encouraged as the means of reaching a decision? The way that this question is resolved impacts upon the cooperative opportunity of mediation.

In response to these questions, the hypotheses have been posed. The hypotheses are built upon a foundation of acknowledgement of the enormous diversity in the mediation field, the core common features of mediation and consideration of the dilemma arising from court-connection.

It is hypothesised that where mediation is court-connected:

- Non-legal interests tend to be ignored;
- Lawyers rather than disputants are the main participants; and
- There is a tendency for competitive approaches to be adopted.

These hypotheses will be tested through an examination of the Supreme Court of Tasmania's mediation programme, which is conducted throughout the following three chapters. Chapter 3 describes the empirical research method. Chapter 4 provides a detailed case study of the Court and its mediation programme, which contextualises the lawyers' perspectives. Chapter 5 analyses the lawyers' interview responses and thereby provides a more specific illustration of the way that mediation is practised in the Supreme Court of Tasmania. Together, these chapters address the second research question posed on page 1: 'What is happening within the Supreme Court of Tasmania's mediation programme?' The hypotheses, which are grounded in the theoretical constructs established throughout this chapter, act as a reference point for this description.

Chapter 6 synthesises the observations made in this chapter, Chapter 4 and Chapter 5, by explicitly addressing the third research question: 'Why is there a difference between the possibilities and the practice of court-connected mediation in Tasmania?' The explanation takes account of the dilemma of court-connection, other court-related factors, mediators' practices and the perspectives of the lawyers who practice within the programme.

Chapter 3

Research Design

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1 Introduction

This Chapter describes the research design of the empirical component of this thesis. A case study of the Supreme Court of Tasmania’s mediation programme (‘the mediation programme’) was conducted to provide evidence of the practice of court-connected mediation and lawyers’ perspectives of and approaches to it. This chapter explains the types of data used and outlines the nature of the data sources and the way that the data was collected. An overview of the representativeness of some data is presented. Some limitations of the data are also explained.

2 The research design

2.1 Case study

The case study was undertaken for two reasons. First, the size and age of the mediation programme at the Supreme Court of Tasmania made it an ideal practical candidate for a case study.¹ Around 300 mediations are conducted each year within the mediation programme. There are approximately 146 legal practitioners who

¹ At the beginning of the research process meetings were arranged with the then Registrar of the Supreme Court of Tasmania to obtain information that would enable a decision to be made about the suitability of the Court as the subject of a case study. Informal discussions were also had with other registry staff and two members of the judiciary for the same purpose. Additionally, these meetings enabled negotiation of the support of the Court for the research.

practise in the civil jurisdiction of the Court and participate in mediations.²

Mediations have been conducted in connection with the Court since 1994, being more formally part of the process since 2001. Many of the legal practitioners and the mediators were able to provide insight into the programme from considerable experience in court-connected mediations.

The second reason a case study approach was adopted is because this form of empirical research is particularly relevant to court-connected mediation, where the local context and local legal culture are important variables that impact on the nature of such programmes.³ The diversity of processes that are labelled 'mediation' has been acknowledged by researchers and it has been recommended that to maximise the ability to generalise research, the features of a particular programme should be described in detail.⁴ Some programme-specific variables that impact on the practice of mediation within the mediation programme are described in Chapter 4. The research aims not only to describe, but also to explain the particular nature of court-connected mediation. A case study approach is necessary in order for complexities, such as the local context, the local legal culture, the aims of various stakeholders and the way that mediation is practised in a particular setting, to be considered in that explanation. Therefore the case study approach is the optimum research design for addressing the research questions.

² Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, Hobart, 4th July 2006).

³ Kathy Mack, 'Court Referral to ADR: Criteria and Research' (National ADR Advisory Council and Australian Institute of Judicial Administration, 2003) Ch 9.

⁴ Mack, above n3, 83-85; National Center for State Courts, State Justice Institute, 'National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings - Implications for Courts and Future Research Needs' (National Center for State Courts / State Justice Institute, 1994) 31-33; Roselle L Wissler, 'Court-Connected Mediation in General Civil Cases : What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641 690-703.

2.2 Data

A variety of data were required to address the hypotheses. First, the mediation programme itself needed to be described in detail to contextualise the data gathered from participants.

Quantitative statistical data about the proportion of litigated matters referred to mediation, the types of matters mediated, the proportion of matters settled and the stages at which matters were settled was desirable. Efficiency measures of the mediation programme form part of the description of the way court-connected mediation is practised in the Supreme Court of Tasmania. Additionally, qualitative data in relation to the style of mediation practised at the court, who participates, the types of issues discussed during mediation, the procedural format followed and some inquiry about who controls the mediation process was also desirable.

In addition to data about the way that mediation is practised at the Court, inquiry was also made about lawyer activities outside the court in connection with the programme. Information was gathered about the way lawyers approach mediation in their general legal practice and the way they prepare themselves and their clients for mediation.

Particular attention was paid to indicators of the three opportunities tested through the hypotheses.

2.2.1 Responsiveness

The key opportunity of responsiveness that is examined in this thesis is to explore the individual interests and preferences of the disputants in regard to content. The hypothesis is that non-legal interests tend to be ignored in the court-connected mediation context. Indicators of the granting or denial of an opportunity to explore interests and preferences include evidence of:

- Variation of the mediation process between cases;⁵
- Lawyer reports that they adopt a broad view of their client's problems in preparation for mediation;⁶
- Lawyer reports that they discuss their client's non-legal interests either before or during mediation;⁷
- Presence of actual defendants or insurer representatives;⁸
- 'Repeat players' in mediation;⁹
- An invitation to disputants to speak about their interests and preferences in the early stages of mediation;¹⁰
- Unusual outcomes that reflect disputants' interests or preferences;¹¹
- Direct disputant participation in the mediation;¹²
- Adoption of a spokesperson role by lawyers during mediation;¹³
- Preference for mediators with legal expertise;¹⁴
- Mediator support for direct disputant participation;¹⁵

⁵ Chapter 4 [3.1], [3.5], [5.1].

⁶ Chapter 4 [4.3.3], [5.4]; Chapter 5 [3].

⁷ Chapter 4 [4.3.3], [5.4]; Chapter 5 [3] and [5.1].

⁸ Chapter 4 [4.2].

⁹ Chapter 4 [4.3.1].

¹⁰ Chapter 4 [3.5].

¹¹ Chapter 5 [5].

¹² Chapter 4 [3.5], [4.2]; Chapter 5 [4.1].

¹³ Chapter 4 [3.5]; Chapter 5 [4].

¹⁴ Chapter 4 [4.1].

- Impact of institutional goals;¹⁶ and
- Lawyer views about the purpose of court-connected mediation.¹⁷

Data were collected about each of these indicators.

2.2.2 Self-determination

The key opportunity of self-determination that is examined in this thesis is for disputants to participate actively in mediation of their disputes. The hypothesis is that in court-connected mediation, lawyers rather than disputants tend to be the main participants in the process. Indicators of the granting or denial of an opportunity to participate directly in the mediation process include evidence of:

- Lawyer support of active client participation in preparation for mediation;¹⁸
- The dynamics of the relationships between lawyers and their clients;¹⁹
- Attendance of disputants at mediation;²⁰
- A mediator's introduction that stresses the disputant's ownership of the matters to be discussed at mediation;²¹
- Direct disputant participation in the mediation;²²
- Adoption of a spokesperson role by lawyers during mediation;²³
- Mediator support for direct disputant participation;²⁴ and
- Lawyer support for direct disputant participation.²⁵

¹⁵ Chapter 4 [5.1].

¹⁶ Chapter 4 [2.3], [6].

¹⁷ Chapter 5 [5].

¹⁸ Chapter 5 [3.2].

¹⁹ Chapter 5 [3], [4].

²⁰ Chapter 4 [4.2].

²¹ Chapter 4 [3.5].

²² Chapter 4 [3.5], [4.2]; Chapter 5 [4.1.1].

²³ Chapter 4 [3.5]; Chapter 5 [4.3].

²⁴ Chapter 4 [5.1].

²⁵ Chapter 5 [4.1].

Data were collected about these indicators as they apply to the Supreme Court of Tasmania.

2.2.3 Cooperation

The key opportunity of cooperation that is examined in this thesis is for non-competitive approaches to be encouraged and supported. The hypothesis is that in court-connected mediation non-cooperative, competitive approaches are adopted frequently. Indicators of the encouragement of cooperative or competitive approaches to mediation include evidence of:

- Compulsion to mediate;²⁶
- Active facilitation of communication by the mediator;²⁷
- Presentation of adversarial legal arguments;²⁸
- Expression of opinion by the mediator about the appropriate way to resolve the dispute;²⁹
- Pressure to reach a settlement;³⁰
- Lawyer attitudes towards the confidentiality of the mediation process;³¹
- Lawyer negotiation styles;³² and
- Responses by the mediator to competitive behaviour.³³

Data were also collected about these indicators.

²⁶ Chapter 4 [3.4].

²⁷ Chapter 4 [5.1].

²⁸ Chapter 4 [3.5], [4.3.3], [5.2].

²⁹ Chapter 4 [5.3].

³⁰ Chapter 5 [4.2.2], [5.3].

³¹ Chapter 5 [4.2].

³² Chapter 4 [4.3.4], [5.2].

³³ Chapter 5 [4.2].

2.3 Data Sources

A number of sources of data were utilised to obtain necessary information for the research.³⁴ Because only limited quantitative data were available about the mediation programme at the Supreme Court of Tasmania, it was necessary to generate new data for the study in addition to examining existing court data. The only published statistical data available for the project were the number of mediation conferences held and the number of matters finalised at those conferences.³⁵ This information was useful but inadequate for the purpose of understanding the practice of mediation within the programme.

The main data sources used were:

1. Court records;
2. Interviews of legal practitioners and mediators; and
3. Observation of mediation conferences.

There were additional sources of information that supplemented the three main data sources.³⁶ The current research topic developed from the experience of implementing a preliminary research approach involving telephone surveys.³⁷ There were

³⁴ More than one data source is preferred in social science research, as this enables validation of interpretations made about what has been observed from the data. Validation of qualitative research findings is necessary because qualitative research is interpretive and subjective in nature. Where a conclusion drawn from one data source is supported by conclusions derived from another data source, then the original conclusion is validated. Where a conclusion is not supported by another source of data, then the data needs to be reinterpreted. Robert E. Stake, *The Art of Case Study Research* (1995).

³⁵ These statistics are published annually in the Chief Justice's Annual Report. There was some variation in the nature of the statistics published from year to year. See Chapter 4 [6.1] and notes.

³⁶ A small number of telephone surveys of both legal practitioners and disputants provided supplementary information. The participation rates in those surveys were inadequate and consequently very little use is made of the survey data. See Appendix A for a discussion of the original empirical research design, the inadequate response rates and the consequential redesign of this research project.

³⁷ Between February 2005 and May 2006 twenty-four telephone surveys were conducted with participants in mediation conferences. Fourteen legal practitioners, four defendant disputants and six plaintiff disputants were surveyed representing less than two percent of the relevant sample size. Each survey was of approximately twenty minutes duration.

inadequate participation rates in the telephone survey to warrant reliance on the telephone survey data to address the original research questions. However, the information that was gathered from the telephone surveys was the genesis of the final research design. Telephone survey responses revealed a trend of dominance by lawyers throughout the legal process, including during court-connected mediation. The telephone survey responses informed the development of the interview questions.

Basic information about the structure of the Court's mediation programme was obtained from the Court's website, legislation, parliamentary debates and the Chief Justices' Annual Reports. These documents also provided information about the expectations of parliamentarians, court administrators and judicial officers for the mediation programme, which furnished additional institutional perspectives about the purpose of court-connected mediation. This information enabled the local context to be detailed for the purpose of the case study.

3 Court records

The court records were used for two purposes. First, they provided information about the mediation case load, the number of mediations conducted and the outcomes of those mediations. Secondly, they provided information about the timing of a number of events, including filing of a writ or application, mediation and finalisation. Together this information sheds light on the way mediation is practised and its role in the finalisation of matters in the Supreme Court.

Some obstacles were encountered in obtaining access to the Court's records in their original form.³⁸ At the commencement of the research, the Court's system for record keeping could be described as 'dated' and accessing information contained in Court records was a cumbersome process. The Court relied primarily on paper records to operate its case management system. Obstacles to accessing the Court records in their original form included some concerns about confidentiality and the Court's data management practices and quality control issues.³⁹ These problems were partially overcome by the then Registrar's⁴⁰ agreement to produce a new computerised database that compiled data from a number of existing sources ('the final database').⁴¹ The final database was to be provided for the purposes of the research, although it was produced primarily for the Court's benefit. It was anticipated that the final database would provide important quantitative data that related to the size, frequency, timing and outcomes of the mediation programme.

An electronic copy of the final database was provided for the purposes of the research in December 2006.⁴² The final database was a significant improvement upon the court records that existed when the project commenced in 2004.

³⁸ From the outset the then Registrar of the Supreme Court of Tasmania expressed support for my research and offered practical support, particularly by the provision of data for the purposes of the research.

³⁹ Each of these issues is explained in the following paragraphs.

⁴⁰ In this thesis all references to 'the then Registrar' are to Registrar Ian Ritchard who was the Registrar of the Court throughout the period of the research until June 2007.

⁴¹ Such a partnership between the Court and researchers, to extract information from existing data systems and convert it into a format of greater use to researchers, was also undertaken in Hann and Baar's evaluative project in Ontario. Robert G. Hann and Carl Baar et al; 'Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months' (Hann and Associates Ltd, Ontario Ministry of the Attorney-General, 2001) Appendix B, 152.

⁴² There was considerable delay in the creation of and data entry onto the final database, partly due to difficulties encountered in employing someone to enter the data. Eventually, in September 2006 it was agreed with the then Registrar that I be employed to enter all the data onto the final database from the existing Court records. My enrolment in my research higher degree was suspended for a period of three weeks whilst I undertook this task on a full time basis. The final entries were made over the remainder of 2006, with the final database being completed in December 2006.

Furthermore, it addressed ethical concerns because identifying information and settlement amounts recorded on the mediation forms were omitted.

The final database contained records of 45,030 matters, being records of matters filed prior to 1st July 2006. It included details of the 2,323 matters in which a court-connected mediation was held between 1st July 1996 and 30th June 2006. It is likely that more mediations were held during this time period, as some anomalies were identified during the compilation of the final database.⁴³ The analysis of the final database is restricted to this decade, which includes a period prior to the formalisation of mediation at the Court, during the period of formalisation-settling in and after formalisation.

In Chapter 4 the three main periods of analysis that are compared in the statistics are three year periods of 1st July 1996 to 30th June 1999, 1st July 1999 to 30th June 2002 and 1st July 2003 to 30th June 2006. The first period is described as ‘prior to formalisation.’ During those years the Court had no power to refer matters to mediation without the consent of the parties. Court-connected mediation was conducted only with the consent of all parties. However, the Court did influence the decision whether or not to refer a matter to mediation. The second period is described as ‘formalisation-settling in.’ During the formalisation-settling in period the Court obtained power to refer matters to mediation by consent, there was a period in which it was doubtful the Court had such power and following legislative reform the Court referred large number of matters to mediation to clear a backlog of pending cases.⁴⁴ There is a one year gap between the second and third periods of analysis, because of

⁴³ See discussion at [3.2] below.

⁴⁴ See further discussion of the evolution of the mediation programme in Chapter 4 [2.2].

the questionable reliability of the final database in relation to that year.⁴⁵ The third period of analysis is described as ‘after formalisation.’ These three years represent a period of the mediation programme after it became accepted as a normal part of the litigation process and after the initial settling in period.

The details on the final database include the following:

- Filing information – registry, file year, file number, date filed, case code;
- Mediation conference – consent or order, date of request or order, date of conference, mediator, location, stage conference called;
- Mediation outcome – settlement, settlement type, agreement to further conference, no agreement;
- Finalisation – date, manner, nature of judgment.

The information for the final database was obtained from three sources: the existing computerised databases, a form completed by the mediator at the conclusion of each conference (‘mediation forms’) and paper records kept by the Registry Supervisor in Hobart for matters that were in the process of being allocated a trial date (‘the cards’).

3.1 Existing computerised databases

A computerised database containing basic information about the progress of actions through the court system was used in each registry, but these were of limited scope and each registry maintained a completely distinct and separate database. A single computerised database was collated by the then Registrar from the three registries

⁴⁵ See below [3.2].

after the end of each financial year.⁴⁶ However, this computerised database did not contain any information about whether a trial date had been allocated to cases or a pre-trial conference had been held. On closer scrutiny it proved to be frequently incomplete or inaccurate, particularly in relation to the categorisation of actions filed.

For example, it was the Court's practice for numerical case codes to be allocated to each matter, each code number representing a particular type of dispute.⁴⁷ Case categorisation codes were allocated by registry staff at the time of the filing of a writ or application. However, frequently the endorsement on a writ did not give adequate information about the nature of the dispute to enable registry staff to allocate a case categorisation code to it accurately. For example, where the nature of an accident was not specified on the endorsement on a writ in a personal injuries matter and the defendant was the Crown, registry staff might allocate a code of '303 personal injuries – other,' when the appropriate code was more likely to be either '302 personal injury – industrial' or '319 professional negligence – medical.' Because there was no routine practice of reviewing case codes later in the litigation process once the issues had been defined by pleadings, it was necessary to review all case codes before reliable statistics could be produced from the computerised database for the purposes of this research. During 2006 the Registry Supervisor audited the Court's records and corrections were made for matters filed between January 2001 and June 2006. This meant that the type of dispute involved was accurate for matters

⁴⁶ The computerised database contained details in relation to every case filed including: the court's file number, date of filing of claim, amount of claim, case code, date of finalisation of litigation, manner of finalisation, judgment amount, the types of documents filed with the court and the date they were filed.

⁴⁷ For example, 201 breach of contract, 203 building contract, 206 misrepresentation, 301 personal injury – motor vehicle, 302 personal injury – industrial, 319 professional negligence – medical, 304 trespass, 305 property damage and 602 probate. See Appendix D for a full list of the case codes used by the Court.

filed during that period. It was important for this research that case categorisation codes were as accurate as possible, because they were relied upon to distinguish between various types of matter. Analysis of matters has been conducted according to broad categories of matter (for example ‘torts’ and ‘commercial’) so that inaccurate case codes do not impact on the results.

The following information was included in the final database from the existing computerised databases: the file number, year, registry, date of filing, case categorisation code and description of the nature of the case. The computerised database also contained a record of the date a matter was finalised, manner of finalisation and the nature of the judgment. However, sometimes the other data sources were relied upon for information about finalisation of matters because where no final judgment had been entered but the matter had otherwise been finalised, no record of finalisation was entered on the computerised database.

The information that was recorded on the computerised database provided quantitative information about the nature of matters litigated in the Supreme Court of Tasmania and the time between commencement and finalisation of litigation. However, the computerised database did not contain any mediation specific information, which necessitated the development of the final database.

3.2 The mediation forms

From 1998 mediators were required to complete a form in relation to each mediation conference they conducted at the Court ('the mediation form').⁴⁸ At the commencement of this study the mediation forms were kept at the Court registry and no data from the forms had been entered onto a computerised database. The mediation forms provided, amongst other things, for the recording of:

- the date of the conference;
- the mediator's initials;
- the file number;
- case name;
- location;
- duration;
- type of matter;
- stage conference called;
- solicitors;
- whether the matter settled;
- whether judgment or agreement was signed;
- if not, whether there was agreement on some matters;
- final offers to settle;
- the mediator's estimate of settlement;
- the mediator's opinion about whether the conference was successful; and
- general comments.

⁴⁸ See Appendix C for a blank copy of a mediation form.

From 2002 the forms provided an indication of whether the conference was by consent of the parties or directed by a Judge and the date of the request or order for mediation. This change followed reforms introduced by the *Alternative Dispute Resolution Act 2001* (Tas) which enabled judges to refer matters to mediation with or without the consent of the parties to the dispute. Additional information concerning the finalisation of matters that had not settled at mediation could also be included on the form. That information was:

- the length of time between the conference and subsequent settlement;
- how the matter settled in terms of consent judgment, final judgment or notification to the Registry Supervisor that parties had agreed on a final settlement; and
- the settlement amount.

An example of the form was provided to the University of Tasmania Human Research Ethics Committee ('the ethics committee') for preliminary consideration. The ethics committee determined that there would be no difficulty in accessing existing mediator forms provided that the following information was not sought:

1. any identifying information (including the case name and names of solicitors)
2. the quantum of settlement offers and settlement amounts (and any potentially identifiable items pertaining to these).⁴⁹

The information that the ethics committee did not think should be provided was of little interest for the research and much of the information on the mediation form was already contained on the existing computerised database. However, the forms contained some new information that was useful for the purpose of the research and

⁴⁹ Email from Gino Dal Pont to Olivia Rundle, 2nd August 2004.

which was not available from another source. This included the date and duration of the mediation conference and the stage of litigation at which the conference was held. This data was relevant to the second research question, which asks how mediation is practised at the Supreme Court of Tasmania. The ethics committee's determination precluded the provision of copies of the mediation forms for the purposes of the research. However, information in the forms that did not raise concerns about confidentiality was entered onto the final database.

The following data was entered onto the final database from the mediation forms: date of mediation conference, whether by consent or order, date of consent or order, mediator, location, stage conference called (very early / pleadings closed / judges papers filed / set down for hearing), whether the mediation resulted in a settlement (Yes / No), whether a judgment or agreement was signed (Yes / No), if there was no settlement whether the matter was adjourned to another conference, whether the parties agreed to a further conference after completing certain steps, whether it was agreed that the matter be set down for trial, or whether there was no agreement. The mediation forms also identified some finalisations that were not recorded in the computerised database because a consent judgment had not been filed.

It became apparent when the data was being analysed that there was a discrepancy between the number of mediations reported in the Chief Justice's Annual Reports and the number of mediation forms. There was a significant difference in the figures relating to the financial year 2002/2003.⁵⁰ The Court's Annual Reports between 1999/2000 and 2004/2005 published overall numbers of mediations held. The

⁵⁰ Chief Justice Cox, 'Report of the Chief Justice of the Supreme Court of Tasmania: Annual Report 2002-2003' (Supreme Court of Tasmania, 2003). See Chapter 4 [Chart 3.3] and notes.

discrepancies in the overall numbers published were 1 in 1999/2000, 23 in 2000/2001, 5 in 2001/2002, 169 in 2002/2003, 3 in 2003/2004 and 2 in 2004/2005. The Court has been unable to explain these inconsistencies. I have chosen to use the final database figures so that they are consistent with other data presented in Chapter 4, except for the year 2002/2003. I suspect that some mediator forms were misplaced for that year between the publication of the Annual Report and the creation of the final database. I am not able to provide further explanation for the difference between the figures published by the Court and the figures produced from the Court's final database. Because there is no breakdown of matter types other than 'personal injuries motor vehicle,' 'personal injuries industrial' and 'other' matters in the Annual Report, details of 'other' matters cannot be ascertained. For that reason no detailed analysis of mediations held during the financial year 2002/2003 has been conducted. The figure published in the Chief Justice's Annual Report has been relied upon for a record of the number of mediations conducted in 2002/2003, although there is no means of testing the accuracy of that figure.

Some omissions on the mediation forms were also detected during compilation of the final database. In particular, some mediators regularly neglected to indicate the duration of the conference on the mediation form. Consequently, the duration of mediation conferences could not be analysed in detail.

3.3 The cards

The third Court record that provided information for the final database was created by the Registry Supervisor in Hobart. A series of cards ('the cards') was compiled for the purpose of managing the trial lists in Hobart. Each card related to a matter

which the Court had been notified was ready for trial. Upon receipt of such notification, the Registry Supervisor recorded information on a card in relation to pre-trial conferences and the convening of mediation conferences. The cards also contained information about pre-trial applications and appearances, trial dates, mediation dates and the date of settlement. The date of settlement might be the date of a mediation resulting in a settlement or the date that the Registry Supervisor received advice that a matter had settled and therefore should be removed from the Court's list of matters awaiting finalisation.

The following information from the cards was transferred into the final database: the date allocated for trial, mediation dates and the date of finalisation. The cards showed how close to an allocated trial date the mediation occurred. The cards also identified some matters that were settled without a formal consent judgment and outside of mediation. The Registry Supervisor recorded the dates on which he was informed that settlement had occurred.

It was discovered when compiling the final database that the cards produced by the Registry Supervisor contained dates of a number of mediations for which there were no mediation forms. This indicated that there were occasions where a mediator had not completed a form. Details of those mediations were entered onto the final database. These omissions, however also raise the possibility that some mediations were conducted without either cards or mediator forms being completed, so that the final database may not include information about all mediations. There were also occasions where a mediation had occurred prior to the certification of readiness of a case for trial but there was no record of a mediation on the cards. The fact that a

mediation had occurred was revealed on the mediation forms and that form was able to be relied upon as evidence that a conference had been held. Nevertheless, it did disclose inconsistencies between the records that were compiled into the final database. A further limitation of the data on the cards prepared by the Registry Supervisor is that they are not a comprehensive record of listing information in relation to the Court's entire Tasmanian caseload. Although the cards did provide a comprehensive record in relation to matters listed for trial in Hobart, they were prepared for only a few matters listed for trial in Launceston or Burnie. For that reason statistics used in this study about the timing of mediation, settlement and allocated trial dates are necessarily restricted to matters filed in the Hobart Registry.

4 Interviews

The primary source of data utilised for the qualitative aspect of this research was interviews of legal stakeholders in the mediation programme. A total of forty-six in-depth interviews were conducted in 2006 and 2007, forty-two with members of the legal profession practising in the Supreme Court civil jurisdiction and four mediators.⁵¹ The aim of the interviews was to gain a better understanding of the expectations, experiences and approaches that members of these groups have about court-connected mediation, its nature, purpose and the role of participants. It was anticipated that interviews of a significant number of legal stakeholders would expose a diversity of opinions about and approaches to the mediation programme. The influence of the approaches and expectations of legal participants on the practice of court-connected mediation provides the explanation for the difference between the potential and practice of court-connected mediation that is explored in this thesis.

⁵¹ The proportions of the population sample of Tasmanian legal practitioners practising in the Court's civil jurisdiction is outlined below.

The interviews provided data that enabled those approaches and expectations to be identified.

An audio recording was made at each interview and subsequently copied onto a CD Rom. The information obtained was selectively transcribed into a FileMaker Pro database. FileMaker Pro is an application that is designed to manage information easily and effectively.⁵² It enables coding, organisation and analysis of both quantitative and qualitative data sets. The interview responses were recorded on the database under headings that corresponded to the interview schedule questions.⁵³ Quantitative statistics were produced from binary or checklist responses, which were complemented by qualitative analysis of the open-ended interview responses.

4.1 Interview of legal practitioners

4.1.1 Representativeness of the interviews

The forty-two interviews of legal practitioners were conducted between 20th April 2006 and 17th May 2007, representing approximately 29% of the practitioners who work in the relevant jurisdiction. The population of legal practitioners practising in civil matters at the Court was approximately 146 at the time the interviews were conducted.⁵⁴ This figure was produced from a list of practitioners who the then Registrar identified as practising in the Supreme Court of Tasmania's civil jurisdiction.

⁵² Claris Corporation, *FileMaker Pro 4.0 User's Guide* (1997) Preface XI.

⁵³ Appendix B contains the interview schedules.

⁵⁴ This figure is based on a list provided by the Registrar of the Supreme Court. However, a small number of practitioners on the list were no longer in practice, or had no experience at mediation. Furthermore, my attention was drawn to some omissions from the list. The population size of 146 is the number of legal practitioners on the list after appropriate adjustments had been made.

Approaches by email, telephone or letter were made to 142 of the legal practitioners practising in the Court's civil jurisdiction. Initial contact by email was preferred because it was less formal than a written letter and the relevant information sheet and consent form could be provided as attachments. Thirty interviews were conducted following initial contact by either email or telephone. To ensure that senior practitioners and members of the independent bar were not under-represented in the study, letters were sent to a random selection of nineteen practitioners within these categories in December 2006. A further twelve interviews resulted from those letters.

The response rate of forty-two lawyers to the invitation to be interviewed was particularly pleasing in light of the apparent difficulties in engaging lawyer participation in research of this kind. This difficulty is demonstrated by comparably small numbers of interviews with lawyers in other Australian studies. For example, Sourdin and her colleagues made considerable effort to engage stakeholders in their investigation of mediation in the Supreme and County Courts of Victoria.⁵⁵ Lawyers were invited to participate by dissemination of information and presentations made to meetings of the Law Institute of Victoria and the Victorian Bar.⁵⁶ Lawyers whose details were collected from court files were sent invitation letters to participate in focus groups.⁵⁷ Only four lawyers participated in the focus groups and another one attended an individual interview.⁵⁸ There appear to be higher response rates achieved for surveys than focus groups or interviews. For example, Howieson engaged 52 out of 98 lawyers invited to participate in her survey in the Local Court of Western

⁵⁵ Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (Victorian Department of Justice, 2009).

⁵⁶ Sourdin (2009), above n55, [1.103] and [1.105].

⁵⁷ Sourdin (2009), above n55, [1.132].

⁵⁸ Sourdin (2009), above n55, [1.132].

Australia.⁵⁹ However, the genesis of the present research was a research method that relied upon surveys and only a 2% response rate was achieved (and the method was consequently abandoned).⁶⁰ The causes of difficulty in engaging Australian lawyers in empirical research are unclear, but might include: time constraints, other priorities, disconnection between researchers and the legal profession or lawyers' perceptions that research has no practical or otherwise valuable application to their legal practice.⁶¹

The Australian experience contrasts with overseas research that sometimes involves high numbers of responses. For example, Genn et al interviewed 172 lawyers in the United Kingdom, Saville-Smith and Fraser surveyed 196 New Zealand lawyers, McEwen et al interviewed 163 lawyers and Clarke et al engaged 424 lawyer responses to questionnaires.⁶²

In qualitative research, large cohorts of participants are not essential. Useful insights can be gained through qualitative research involving numbers of in depth interviews comparable to those conducted in this study. The present study appears to be the first Australian study that assesses lawyers' perspectives of mediation and involves more

⁵⁹ Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9 (2) *Murdoch University Electronic Journal of Law* <www.murdoch.edu.au/elaw/issues/v9n2/howieson92_test.htm>, IV.

⁶⁰ See Appendix A.

⁶¹ See some explanations offered by lawyers in relation to my initial research design. Appendix A.

⁶² Professor Dame Hazel Genn, Professor Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vencappa, 'Twisting arms: court referred and court linked mediation under judicial pressure' (Faculty of Laws, University College London, University of Nottingham Business School, 2007); K Saville-Smith and R Fraser, 'Alternative Dispute Resolution: General Civil Cases' (New Zealand Ministry of Justice, 2004); Craig A. McEwen, Nancy H. Rogers and Richard J. Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 *Minnesota Law Review* 1317; Craig A. McEwen, Lynn Mather and Richard J. Maiman, 'Lawyers, Mediation, and the Management of Divorce Practice' (1994) 28(1) *Law & Society Review* 149; Stevens H Clarke, Elizabeth D Ellen and Kelly McCormick, 'Court Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects' (North Carolina Administrative Office of the Courts, 1995).

than ten in depth interviews with lawyers.⁶³ Many overseas studies have involved similar numbers of interviews as those involved in the present study. For example: McAdoo's research in the Minnesota Supreme Court involved in depth interviews with 23 civil litigators, Saville-Smith and Fraser's New Zealand research included 36 lawyer interviews, Macfarlane interviewed 20 commercial litigators from Toronto and 20 from Ottawa, and Macfarlane and Keet engaged 62 lawyers in focus groups.⁶⁴

This research relates to a specific programme and close to one third of the lawyers who practised within that programme agreed to be interviewed. The interview data therefore provides a rich description of trends, themes and differences amongst lawyers practising in the Supreme Court of Tasmania's mediation programme.

Eighty-six percent of the interviewees were male and eighty-eight percent practised as a barrister and solicitor, with the remainder being from the independent bar at the time of interview. Seventy-nine percent of the interviewees were based in Southern Tasmania, fourteen percent in the North and seven percent on the North-West. Most of the practitioners interviewed were admitted to the Supreme Court of Tasmania between the 1970s and 1990s, with the greatest number being admitted in the 1980s.

General characteristics of the interviewees are presented in the following Table [4.1A].

⁶³ Sourdin (2009), above n55, engaged 5 lawyers in focus groups and interviews and Joel Gerschman, 'Pilot Study Examines Lawyer's Roles in VCAT Mediations' (2003) 7 *VCAT Mediation Newsletter* 7, interviewed 10 lawyers.

⁶⁴ Bobbi McAdoo, 'A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota' (2002) 25 (3) *Hamline Law Review* 401; Saville-Smith and Fraser (2004), above n62; Julie MacFarlane, 'Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) *University of Missouri Journal of Dispute Resolution* 244; Julie Macfarlane and Michaela Keet, 'Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program' (2005) 42 (3) *Alberta Law Review* 677.

Table 4.1A**General characteristics of legal practitioner interviewees**

| <i>Characteristic</i> | <i>Number</i> | <i>%</i> |
|--|---------------|------------|
| Gender – male | 36 | 86 |
| - female | 6 | 14 |
| <i>Total</i> | <i>42</i> | <i>100</i> |
| Barrister and Solicitor | 37 | 88 |
| Barrister | 5 | 12 |
| <i>Total</i> | <i>42</i> | <i>100</i> |
| Decade of admission to the Supreme Court of Tasmania | | |
| 1960s | 3 | 7 |
| 1970s | 9 | 22 |
| 1980s | 16 | 38 |
| 1990s | 11 | 26 |
| 2000s | 3 | 7 |
| <i>Total</i> | <i>42</i> | <i>100</i> |
| Base – South | 33 | 79 |
| - North | 6 | 14 |
| - North-West | 3 | 7 |
| <i>Total</i> | <i>42</i> | <i>100</i> |

Source: Lawyer Interview Database

The general characteristics of the interviewees are compared to the general characteristics of the population of legal practitioners practising in the Court's civil jurisdiction⁶⁵ in Table [4.1B]. The purpose of the table is to demonstrate the representativeness of the interview sample.

⁶⁵ This population was defined as the 146 legal practitioners identified on the Registrar's list.

Table 4.1B

**Comparison of general characteristics of legal practitioners in the population
sample and interview sample**

| <i>Characteristic</i> | <i>% of the population of legal practitioners practising in the Court</i> | <i>% of the interview sample</i> |
|---|---|--|
| | N=146 | N=42 |
| Gender - male | 81 | 86 |
| - female | 19 | 14 |
| <i>Total</i> | <i>100</i> | <i>100</i> |
| Barrister and Solicitor | 92 | 88 |
| Barrister | 8 | 12 |
| <i>Total</i> | <i>100</i> | <i>100</i> |
| Decade of admission to the Supreme Court of Tasmania | | |
| 1960s | 4 | 7 |
| 1970s | 25 | 22 |
| 1980s | 32 | 38 |
| 1990s | 30 | 26 |
| 2000s | 9 | 7 |
| <i>Total</i> | <i>100</i> | <i>100</i> |
| Base – South | 79 | 79 |
| - North | 9 | 14 |
| - North-West | 12 | 7 |
| <i>Total</i> | <i>100</i> | <i>100</i> |

Sources: Law Society of Tasmania and Lawyer Interview databases

Table [4.1B] demonstrates that the interview sample was roughly representative of the general population of legal practitioners practising in the relevant jurisdiction. However, the interview sample had 5% more males, 4% more barristers and an over-representation of legal practitioners from the North of the state and under-

representation of practitioners based in the North-West. Nevertheless, the proportion of Southern based practitioners interviewed compared to non-Southern based practitioners was representative and therefore the interviews did not suffer from a ‘Hobart-centric’ bias. There was also a lesser proportion of representatives of the more junior members of the legal profession. A number of more recently admitted practitioners declined to be interviewed on the basis that they had little or no experience in Supreme Court mediation. By interviewing a higher proportion of more senior practitioners, this research benefits from the perceptions of the mediation programme that have developed through experience. However, there is still a representative sample of more junior practitioners in the interview sample.

There was a range of specialisations within the interview sample. Each interviewee was asked to describe their main case load, in terms of a number of categories of case types. Table [4.1C] shows the proportions of each category.

Table 4.1C

Main case load of interviewees

| <i>Category of main case load</i> | <i>Specialisation</i> | | <i>Number of practitioners</i> | <i>%</i> |
|-----------------------------------|-----------------------|---|--------------------------------|------------|
| Mixed Practice | | | 13 | 31 |
| Personal Injuries | Plaintiff | 6 | | |
| | Defendant | 9 | | |
| | Mixed | 5 | 20 | 48 |
| Commercial | | | 7 | 16 |
| Family Law | | | 2 | 5 |
| <i>Total</i> | | | <i>42</i> | <i>100</i> |

Source: Lawyer Interview Database

Given that most of the mediations conducted at the Court are in relation to personal injuries matters,⁶⁶ the case loads reported by the legal practitioners appear to be reasonably representative of the overall population of lawyers engaged in mediation at the Court.

No statistical analyses have been undertaken to delineate differences between genders, seniority or main case load. The small sample sizes of females, barristers, practitioners admitted in various decades, practitioners in the north and north-west of the state and practice specialties restrict meaningful quantitative analysis.

Formal statistical significance tests are not undertaken in relation to any of the data and fall outside the scope of this thesis. Numbers from which percentages have been generated are provided throughout the analysis of the interviews. Both the numbers and percentages are descriptive statistics only. They are not intended to be either diagnostic or predictive of the views or practices of lawyers generally, but are merely descriptive of the interview sample. Where percentages are presented in the discussion of these research findings, they should be read with appropriate caution.

The interview analysis is a qualitative investigation of lawyer perspectives of court-connected mediation. Qualitative analysis enables an exploration of subtleties, variations and differences; as well as themes, trends and consistencies. A diversity of views from practitioners was expected and is reported throughout this thesis. Where a cohort of lawyers expressed similar views, the numbers and proportions contextualise the quotes.

⁶⁶ See Chapter 4 [3.3].

4.1.2 Interview questions

The interview questions are set out in Appendix B. The scheduled questions were designed to encourage the legal practitioners to share their perspectives of the court-connected mediation programme in respect of particular issues that the research explored. The interview data addressed the aim of the research, which was to analyse the interaction between mediation and court-connected processes and practices in court-connected mediation. Significant factors in that interaction are the perspectives, approaches and behaviours of legal practitioners towards court-connected mediation. The interviews gathered evidence about these factors.

The interviews were semi-structured which means that occasionally not all of the questions on the schedule were asked during the interview. The legal practitioners had agreed to allocate an hour of their time for the interview and sometimes time constraints meant that not all of the interview questions were asked. The flexible structure of the interviews meant that if practitioners had particular information that they wanted to share, then time would be spent providing them with that opportunity. Consequently, there were two or three occasions where I omitted one or two questions unintentionally. The first three interviews were conducted as ‘pilot’ interviews and the final interview schedule was designed afterwards and revised according to observations made during the pilot interviews. For these reasons a number of the questions were answered by only thirty-nine or fewer interviewees.

The interview commenced with some general questions about the case load and the number of mediations that the practitioner had participated in over the preceding

twelve months. Of the thirty-nine practitioners who were asked the latter question, thirty-four had participated in less than ten mediations and five had participated in more than ten (but less than twenty). An indication of the frequency with which legal practitioners advised clients in relation to dispute resolution processes other than litigation, attempted to resolve clients' disputes by negotiation outside of mediation or advised clients to participate in mediation, was also sought. These background questions gave a preliminary insight into the attitude of legal practitioners to dispute resolution and mediation generally because they demonstrated whether practitioners prioritised the resolution of their client's disputes by informal negotiation or mediation processes or if their focus was on the formal path to trial. Whether or not they recommended mediation to their clients or took a passive approach to referral to court-connected mediation gave a preliminary indication of their attitude towards the process. Lawyers who positively supported the programme would be more likely to advise their clients to participate in it than those who did not provide such advice.

The interview questions addressed each of the hypotheses about court-connected mediation and its delivery of the key opportunities.

In respect of the hypothesis that non-legal interests tend to be ignored in court-connected mediation, lawyers answered questions about the following:

- The manner in which they prepare themselves and their clients for mediation, including what kinds of matters they discuss with their clients.⁶⁷
- Comparisons between preparation for mediation and trial.⁶⁸
- The way that a typical mediation would proceed in the programme.⁶⁹

⁶⁷ Questions 8, 9, 10 in Lawyer Interview Schedule. Responses discussed in Chapter 5 [3].

⁶⁸ Question 11 in Lawyer Interview Schedule. Responses discussed in Chapter 5 [3.1].

- Advantages, disadvantages, gains and losses derived from the court-connected mediation programme.⁷⁰
- Best and worst experiences at mediation, programme features to retain and recommended changes.⁷¹
- Views about the appropriateness of mediator evaluation of legal claims.⁷²

In respect of the hypothesis that non-disputants tend to be the main participants in court-connected mediation, lawyers were asked questions about the following:

- The difference that mediation has made to the way that they practice.⁷³
- The manner in which they prepare themselves and their clients for mediation.⁷⁴
- Skills and training required for effective participation in mediation.⁷⁵

⁶⁹ Question 16 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [5].

⁷⁰ Questions 12, 13, 14, 15 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [4.3.4]; Chapter 5 [2], [4.1.1] and throughout [5]. At the time that the interview schedule was drafted, it was known that a reasonably large number of cases litigated in the Supreme Court of Tasmania were referred to the Court-connected mediation programme. In the period between 1999 and 2006, an average of 299 mediations was conducted each year (see Chart 3.4A in Chapter 4). The conversations that had been held prior to the drafting of the interview schedule with the then Registrar and other individuals involved with the Supreme Court's mediation programme indicated that the practice of the Court was to require mediation prior to the allocation of a trial date and that most matters were referred to mediation. When the Court's database was provided, it was realised that a small proportion of all finalised litigated matters were referred to mediation (see [3.4.3] of Chapter 4). On reflection, it is acknowledged that questions 14 and 15 in the interview schedule are somewhat loaded. The questions posed in the schedule are 'What are we losing by having *so many* cases go to mediation' and 'What are we gaining from *so many* cases going to mediation?' These questions supplemented questions 12 and 13, which asked 'What advantages does the mediation program have?' and 'What disadvantages does the mediation process have?' Questions 14 and 15 invited interviewees to add their perceptions about the impact of the court-connected programme in a broader institutional or societal sense as opposed to the narrower impacts on disputants and individual cases. Most of the interviewees conveyed a perception that mediation was a frequent litigation activity prior to the particular questions being asked, which made the loading of the questions consistent with what they had already said about the programme during the interview. See for example lawyer responses to the questions about the frequency of their advice to their clients to participate in mediation and about the difference that mediation in the Supreme Court has made to the way that they practice (both questions discussed in [2] in Chapter 5). It is therefore concluded that the loading of the questions, although acknowledged, probably had minimal impact on the quality of the interview responses.

⁷¹ Questions 17, 18, 19, 20 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [4.3.4]; Chapter 5 [3.2], [4.2.1], [4.2.2], [5.2.2], [5.3.1].

⁷² Question 24 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [5.3]; Chapter 5 [4.2.3].

⁷³ Question 6 in Lawyer Interview Schedule. Responses discussed in Chapter 5 [2].

⁷⁴ Questions 8, 9, 10 in Lawyer Interview Schedule. Responses discussed in Chapter 5 [3].

- The way that a typical mediation would proceed in the programme.⁷⁶
- Best and worst experiences at mediation, programme features to retain and recommended changes.⁷⁷
- Comparisons between court-connected mediation and lawyer negotiation.⁷⁸
- Views about the legal practitioner's role in court-connected mediation.⁷⁹

In respect of the hypothesis that competitive, non-cooperative behaviours are adopted in court-connected mediation, lawyers were asked questions about the following:

- The difference that mediation has made to the way that they practice.⁸⁰
- The skills and training required for effective participation in mediation.⁸¹
- Best and worst experiences at mediation, programme features to retain and recommended changes.⁸²
- Comparisons between lawyer negotiation and court-connected mediation.⁸³
- Views about the appropriateness of mediator evaluation of legal claims.⁸⁴

4.2 Interview of Mediators

All four mediators who conducted mediations at the Court during the period of the study participated in an interview during October or November 2006. There are two other mediators who have conducted a small number of mediations in the programme

⁷⁵ Question 7 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [4.3].

⁷⁶ Question 16 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [5].

⁷⁷ Questions 17, 18, 19, 20 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [4.3.4]; Chapter 5 [3.2], [4.2.1], [4.2.2], [5.2.2], [5.3.1].

⁷⁸ Questions 21, 22 in Lawyer Interview Schedule. Responses discussed in Chapter 5 [2].

⁷⁹ Question 23 in Lawyer Interview Schedule. Responses discussed in Chapter 5 [4.3].

⁸⁰ Question 6 in Lawyer Interview Schedule. Responses discussed in Chapter 5 [2].

⁸¹ Question 7 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [4.3].

⁸² Questions 17, 18, 19, 20 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [4.3.4]; Chapter 5 [3.2], [4.2.1], [4.2.2], [5.2.2], [5.3.1].

⁸³ Questions 11, 21, 22 in Lawyer Interview Schedule. Responses discussed in Chapter 5 [2].

⁸⁴ Question 24 in Lawyer Interview Schedule. Responses discussed in Chapter 4 [5.3]; Chapter 5 [4.2.3].

in the past. They have conducted only eighteen and five Supreme Court mediations respectively, so their experience is much more limited than that of the mediators who were interviewed.

Many of the interview questions asked of mediators paralleled those asked of legal practitioners, however, additional questions were asked.⁸⁵ The following additional questions related to the nature of the mediation process practised at the court:

- How would you describe the style of your mediation practice at the Supreme Court?
- Which of the following categories best describes your style:
 - Facilitative
 - Settlement
 - Evaluative
 - Transformative

When a mediator requested an explanation of the styles of mediation, they were explained in terms of the description of models of mediation practice that are outlined in Chapter 2.⁸⁶ These questions were not asked of legal practitioners for two main reasons. First, very few legal practitioners were expected to have undertaken any training in mediation and therefore they were unlikely to have an understanding of theoretical mediation models.⁸⁷ This was confirmed in the interviews. Secondly, it was known that all of the mediators had undertaken mediation training and it was expected that they would be able to identify the style of mediation that they believed

⁸⁵ See Appendix B for a copy of the Mediator Interview Schedule.

⁸⁶ Chapter 2 [3.3]. See also Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 43-47; David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (2005) [5.45]-[5.110].

⁸⁷ This expectation was confirmed during the interviews, as only 14% (6 of 42) of interviewees had undertaken formal mediation training.

they practised. Lawyer experiences of mediation style were drawn from other interview questions that did not require an understanding of labels that have been applied to particular mediation practices.⁸⁸

Both mediators and legal practitioners were asked questions relating to the role of mediators in the mediation process. For example:

- Should a mediator ever advise disputants about the value of a claim, or the likely result if the matter proceeded to trial? If yes, in what circumstances?

This question provided insight into expectations about mediator impact on the content of the process.

The mediator interview responses form part of the description of the mediation programme conducted in Chapter 4.⁸⁹

5 Observations

Two groups of observations of mediations at the Supreme Court of Tasmania were conducted during the research process. At these mediations I was a non-participant observer. The first group of observations were made during the first year of the project. As a preliminary step I attended eight mediations in December 2004, located at each of the three Registries of the Supreme Court of Tasmania.⁹⁰ The purpose of these observations was to observe the general nature of mediation in the Court. It enhanced my understanding of the programme by introducing me to the style and content of the process practised.

⁸⁸ For example question 16: 'How would a typical mediation work?'

⁸⁹ See in particular Chapter 4 [3.5], [4.1] and [5].

⁹⁰ Observations were conducted with the prior consent of all participants. Consent was refused by only one participant at the mediations I sought to attend.

Later in the research process the benefit of further observation was recognised, providing an additional source of data that could be used to validate the findings derived from other data sources. Some tentative conclusions had been drawn from the other data sources and further observation verified the validity of those conclusions. In 2007, with the consent of all participants, I observed a further two mediations. The ten observations supplemented other evidence about the way court-connected mediation is practised.

6 Conclusion

This chapter has explained the choice of research design and described the research method in detail. In summary, this research relies on a case study of the Supreme Court of Tasmania's mediation programme for evidence of the practice and perspectives of court-connected mediation. Evidence is sourced primarily from court records, interviews of legal stakeholders in the programme and observation of mediations at the Court. The research findings are presented throughout the following chapters. Chapter 4 contains a detailed description of the Court's mediation process, using some evidence obtained from the empirical data. In Chapter 5 the findings about lawyer practices and perspectives of court-connected mediation are presented. In Chapter 6 the discussion is continued and concluded.

Chapter 4

Court-Connected Mediation Practice in the Supreme Court of Tasmania

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1 Introduction

This chapter presents the case study of the mediation practice at the Supreme Court of Tasmania. It provides a broad background to address the second research question: ‘What is happening within the Supreme Court of Tasmania’s mediation programme?’ The case study is a detailed analysis of the programme’s features and serves a number of purposes. Because court-connected mediation may encompass processes across the breadth of the mediation field (see Chapter 2), it is necessary to identify programme-specific features in order to define a mediation programme. The descriptor ‘mediation’ is too broad to identify the nature of the process accurately. Because of the variety inherent in mediation, it is important to disclose programme-specific features when comparing findings between mediation programmes. The detailed description in this Chapter therefore facilitates comparison with other research. The case study also contextualises the lawyers’ interview responses, which are analysed in Chapter 5. That chapter finalises the description of how mediation is practised in the Court. Without the background description of programme features

such as case type, referral timing, mediators' attributes and the legislative and policy framework, it would be difficult to develop an understanding about why lawyers approach court-connected mediation in the way that they do. This chapter therefore also contributes to the discussion of the third research question in Chapter 6: 'Why is there a difference between the possibilities and the practice of court-connected mediation in Tasmania?'

Throughout this chapter, quantitative empirical data from the Court's database is analysed and supplemented with information from other data sources.

Some of the programme features that are identified in this chapter impact upon the core features of responsiveness, self-determination and cooperation. This chapter provides some indication of the extent to which non-legal interests are considered, direct disputant participation occurs and cooperative approaches are adopted. Evidence which addresses the hypotheses, which predict that all of these mediation features are reduced in the court-connected mediation context, is highlighted throughout.

This chapter begins by detailing background information about the Court, the evolution of its court-connected mediation programme and the institutional objectives of that programme. Particular characteristics of the mediation process at the Court are then outlined including: its legislative framework, location, the nature of mediated disputes, its referral practices and format. Evidence about the participants, the style of practice and the content of mediation conferences is then discussed. Finally, some quantitative indicators of settlement and efficiency

outcomes of the mediation programme are presented, these being its primary institutional objectives. References are made to other court-connected programmes as a comparison with the features of the Supreme Court of Tasmania's programme.

2 Background

2.1 The Supreme Court of Tasmania

2.1.1 Jurisdiction

The Supreme Court of Tasmania ("the Court") has jurisdiction in all civil matters in Tasmania but, until July 2007 when the jurisdiction of the Magistrates Court increased, the Court normally dealt only with matters involving disputes valued in excess of \$20,000.¹ The Court had exclusive jurisdiction over all civil claims that exceeded that amount and shared jurisdiction over claims below \$20,000 with the Magistrates Court.² That shared jurisdiction now extends to claims of up to \$50,000.³ There are no intermediate courts in Tasmania.⁴ The Supreme Court, like other Supreme Courts, deals with a wide range of civil actions including actions for debt recovery, contractual disputes, torts, declaratory relief, admiralty and probate.⁵ Also within the Court's jurisdiction are enforcement proceedings, originating applications,

¹ *Supreme Court Civil Procedure Act 1932* (Tas); *Magistrates Court (Civil Division) Act 1992* (Tas) s7; Supreme Court of Tasmania, *About the Court* (2003) <<http://www.courts.tas.gov.au/supreme/about.htm>> at 15th September 2004.

² *Magistrates Court (Civil Division) Act 1992* (Tas) s7.

³ Supreme Court of Tasmania, *About the Court* (2007), <www.supremecourt.tas.gov.au/about_us> at 3rd July 2008; Magistrates Court of Tasmania, *Civil Division* (2007), <www.magistratescourt.tas.gov.au/divisions/civil> at 3rd July 2008.

⁴ Intermediate Courts include the District Courts in New South Wales, Queensland, South Australia and Western Australia and the County Court of Victoria. There are no intermediate courts in the Northern Territory, the Australian Capital Territory or Tasmania.

⁵ See for example descriptions in Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (Victorian Department of Justice, 2009); Tania Sourdin and Tania Matruglio, 'Evaluating Mediation – New South Wales Settlement Scheme 2002' (La Trobe University, University of Western Sydney, 2002).

appeals from lower courts and tribunals and transfers of matters from other jurisdictions.

The judicial officers of the Court comprise six judges and one Associate Judge.⁶

Unlike many other Australian Supreme Courts, the Court is not divided into divisions.⁷ The judges are generalist and preside over all types of matters at first instance and on appeal, both civil and criminal. The Associate Judge's jurisdiction is more limited than that of the judges.⁸ The Associate Judge may exercise all of the powers of the Court other than those outlined in rule 962 of the *Supreme Court Rules 2000* (Tas). Among other things, the Associate Judge has no jurisdiction to hear appeals, to make rulings about statutory interpretation, or to hear and determine actions or applications unless the parties consent or a judge orders otherwise.⁹ The role of the Associate Judge is primarily to conduct the pre-trial case management at the Court. This involves making directions about pre-trial procedures and includes the referral of matters to mediation. The judges can refer matters to mediation but the Associate Judge is the primary pre-trial case manager at the Court and is therefore the primary judicial officer who refers matters to mediation in the Court.

⁶ The Master's title was changed to Associate Judge on 1st March 2008. *Supreme Court Amendment Act 2007* (Tas). Throughout the relevant period of this research the appropriate title was 'Master'. Therefore reference will be made to both the 'Associate Judge' and 'Master' in this chapter. In particular, references to opinions expressed by the Associate Judge when his title was 'Master' will be referred to as opinions expressed by the 'Master.'

⁷ Chief Justice Cox, 'Report of the Chief Justice of the Supreme Court of Tasmania: Annual Report 2002-2003' (Supreme Court of Tasmania, 2003) 3. The Supreme Court of Victoria is divided into the Court of Appeal Division and the Trial Division. The Trial Division is divided into the Commercials and Equity Division, the Common Law Division and the Criminal Division. A judge heads each division and manages its work. Supreme Court of Victoria, <www.supremecourt.vic.gov.au> at 30th July 2007. The Supreme Court of New South Wales is divided into the Common Law Division and the Equity Division, each of which has a Chief Judge. Supreme Court of New South Wales, <www.lawlink.nsw.gov.au/sc> at 30th July 2007. The Supreme Court of Queensland is divided into the Court of Appeal and the Trial Division. Supreme Court of Queensland, <www.courts.qld.gov.au> at 30th July 2007. The Supreme Court of Western Australia is divided into the Court of Appeal and the General Division. Supreme Court of Western Australia, <www.supremecourt.wa.gov.au> at 30th July 2007.

⁸ *Supreme Court Rules 2000* (Tas) r 962; *Supreme Court Act 1959* (Tas).

⁹ *Supreme Court Rules 2000* (Tas) r 962; *Supreme Court Act 1959* (Tas).

There are three Supreme Court registries, which are located in Hobart (Southern Tasmania), Launceston (Northern Tasmania) and Burnie (North-western Tasmania). One judge is based in the North and the other six judicial officers are based in the South of the state. All judicial officers travel on circuit to the registries at which they are not permanently based.

Due to the small population of Tasmania, the Court is a small Supreme Court in terms of its case load.¹⁰ There were 1,336 civil lodgements in 2005-2006.¹¹ In contrast, in 2005-2006 the number of civil lodgements received by the Supreme Court of New South Wales was 13,182 and the Victorian Supreme Court received 6,672 lodgements.¹² The Supreme Courts in smaller jurisdictions such as South Australia and the Australian Capital Territory (ACT) manage caseloads of a similar size to Tasmania, namely 1,203 in 2005-2006 for South Australia and 1,155 for the ACT in the same reporting period.¹³ The Supreme Court of New South Wales has exclusive jurisdiction over claims that exceed \$750,000, in Queensland the District Court's limit is \$250,000 and in Western Australia it is \$500,000.¹⁴ It follows that the Tasmanian Supreme Court deals with matters involving significantly lower sums of money than the Supreme Court jurisdictions where there are intermediate courts.

¹⁰ Tasmania's population is around 489,600. The Australian population is around 20,674,400, meaning Tasmania accommodates 2.37% of the national population. [Australian Bureau of Statistics, *Australian Demographic Statistics No3101.0* (September 2006) <www.abs.gov.au> at 17th April 2007].

¹¹ Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2007: Part C Justice' (Australian Government Productivity Commission, 2007) [Table 6A.2].

¹² Steering Committee for the Review of Government Service Provision (2007), above n11, [Table 6A.2].

¹³ Steering Committee for the Review of Government Service Provision (2007), above n11, [Table 6A.2].

¹⁴ Steering Committee for the Review of Government Service Provision (2007), above n11, Ch 6 [Box 6.3].

The Tasmanian legal community is also relatively small. There are just over 500 legal practitioners registered with the Law Society of Tasmania.¹⁵ Tasmanian legal practitioners represent around 1.5% of solicitor practices and 0.4% barrister practices in Australia.¹⁶ Legal practitioners are admitted to the Supreme Court of Tasmania as both barristers and solicitors but there is a growing independent bar.¹⁷ Around 145 legal practitioners regularly appear in civil matters at the Court.¹⁸

2.1.2 Policy context

The policy context in which the Court operates includes government and institutional policies. The performance indicators assessed by the federally funded Productivity Commission ('the Productivity Commission') are used by courts (including the Supreme Court of Tasmania) to measure their own effectiveness and efficiency.¹⁹ The Productivity Commission oversees the performance of courts at a national level. It applies performance indicators that are based on common objectives for court administration services across Australia.²⁰ Courts in Australia are expected to be accessible and efficient. The performance objectives for court administration as set out in the Productivity Commission's reports are:

¹⁵ On the 17th April 2007 there were 471 barristers and solicitors and 35 specialist barristers registered in Tasmania. *Law Society of Tasmania* <www.taslawsociety.asn.au> at 19th April 2007.

¹⁶ Australian Bureau of Statistics, 'Legal Practices Australia' (8667.0, 2001-02) 20 [Table 2.8], 29 [Table 3.5].

¹⁷ *Legal Profession Act 2007* (Tas). In June 2002 there were only 13 barristers practising in Tasmania, which can be compared to the Law Society's 2007 figure of 35. Australian Bureau of Statistics (2001-2), above n16; Law Society of Tasmania, above n15.

¹⁸ See discussion in Chapter 3 at [4.1]; Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, Hobart, 4th July 2006).

¹⁹ State of Tasmania, *Estimates Committee B Hearing*, House of Assembly, Tuesday 6th June 2000, 45 (Mr Ian Ritchard, then Registrar of the Supreme Court of Tasmania). 'The Council of Australian Governments report on government services is developed in a suite of performance indicators for courts and benchmarkings between courts and it is those indicators that we will primarily use as the indicators for our courts' efficiency and effectiveness.'

²⁰ Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2004: Part C Justice' (Australian Government Productivity Commission, 2004) [6.2].

- ❑ to be open and accessible
- ❑ to process matters in an expeditious and timely manner
- ❑ to provide due process and equal protection before the law
- ❑ to be independent yet publicly accountable for performance...

In addition, all governments aim to provide court administration services in an efficient manner.²¹

The Court has an interest in ensuring that its procedures, including court-connected mediation procedures, promote these objectives. The objectives are consistent with the objectives of civil justice systems internationally.²²

These obligations contribute to the dilemma of closed, private processes such as mediation being adopted within court systems. Private processes are more difficult to monitor than open trial proceedings. According to the Court's overriding performance objectives, there is some obligation for courts to monitor the fairness of processes that occur with judicial sanction. There is also an obligation to ensure that such processes are conducted in an efficient manner.

In 2003 the judges of the Supreme Court of Tasmania established a case management standing committee to advise on and monitor the effectiveness of case-management

²¹ Steering Committee for the Review of Government Service Provision (2004), above n20, [Box 6.5].

²² Canadian Bar Association, 'Report of the Canadian Bar Association Task Force on Civil Systems of Justice' (Canadian Bar Association, 1996) 28; Attorney-General of Ontario, 'Civil Justice Review (Ontario): Supplementary Report' (Ontario Ministry of the Attorney General, 1996); Attorney-General of Ontario, 'The Modern Civil Justice System: An Overview Summary of the First Report' (Ontario Ministry of the Attorney General, 1995); Lord Woolf, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (Department for Constitutional Affairs, 1996); Lord Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (Department of Constitutional Affairs, 1995); The Hon Justice John Hansen, 'Facing New Challenges' (Paper presented at the 17th AIJA Annual Conference, Adelaide, 6-8 August 1999).

in the Supreme Court of Tasmania.²³ The case-management committee adopted principles that included:

- The justice system should be viable and accessible;
- Legal proceedings should be efficient and expeditious;
- In litigation there should be early and clear identification of:
 - the issues in litigation,
 - the risks of proceeding to trial,
 - timetables for the conduct of the litigation,
 - the costs likely to be incurred and
 - any non-litigious avenues for dispute resolution;
- Court-imposed orders and directions should be complied with unless otherwise directed; and
- Pre-trial procedures should only be performed for the purpose of advancing the case productively or disposing of the dispute efficiently.²⁴

Such principles underpin all procedures connected to the Court including the mediation programme.

Court-connected mediation may promote these objectives by being more accessible than trial in terms of cost and formality, providing an opportunity to resolve litigated disputes earlier, being a non-litigious avenue for dispute resolution and by advancing cases productively. The emphasis on these aspects of mediation creates a process that is part of rather than an alternative to the legal system. It has been found that when mediation is assimilated into the litigation system, it tends to promote the resolution

²³ Chief Justice Cox, 'The Chief Justice's Annual Report 2003-2004' (The Supreme Court of Tasmania, 2004) 5. The Case Management Committee is made up of representatives of the Court, the Independent Bar, the Plaintiff Lawyers Association, the Bar Association, the Law Society of Tasmania, the Director of Public Prosecutions and the Medico Legal Society.

²⁴ Cox (2004), above n23, 6.

of the legal issues over non-legal issues and the emphasis becomes institutional goals of quicker, cheaper settlements.²⁵ The degree to which mediation is conducted in a ‘non-litigious’ manner is affected by the adversarial arguments that may be made within it and by the case management objectives of the Court, which highlight the Court’s interest in the efficient resolution of litigated issues.

2.2 Evolution of Mediation in the Supreme Court of Tasmania

The history of conferencing in the Supreme Court of Tasmania began in 1992 following adverse publicity regarding Tasmania’s backlog of unresolved Motor Accident Insurance Board (‘MAIB’) claims.²⁶ The Court and the MAIB initiated the introduction of informal conferences for the purpose of resolving some of the outstanding claims. Where the parties consented, MAIB matters were referred to the then Registrar of the Court for a conference.²⁷ The backlog of MAIB matters reduced significantly and on that basis the Court started a trial of conferencing for all kinds of civil cases in 1995. The aim of the conferences was only to explore the possibility of settlement. The then Registrar, who conducted the conferences, had no decision-making role. There were no guidelines for conduct of the conferences so they could be conducted in the style of facilitated settlement negotiations, conciliation or mediation. The trial programme applied to cases where both parties consented and only after the matter was certified ready for trial. Referral was prompted by judicial officers where no request had been made by the litigants, although there was no compulsion to participate.

²⁵ Dorothy J. Della Noce, Joseph P. Folger and James R. Antes, ‘Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection’ (2002-2003) 3 *Pepperdine Dispute Resolution Law Journal* 11.

²⁶ Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, 30th June 2004).

²⁷ Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, 30th June 2004). The Registrar referred to retired in July 2007.

Mediation at the Court was formalised between 2000 and 2001. Prior to 2000, dispute resolution in Tasmania was an entirely voluntary process. Mediation was initially formalised by the introduction of the *Supreme Court Rules 2000* ('the Rules'), which contained a provision empowering the Court to refer matters to mediation with or without the consent of the parties.²⁸ The Court referred matters to mediation pursuant to the Rules between May 2000²⁹ and 18th December 2000 when the case of *Burke v Humphrey*³⁰ was decided. In that case the power under the rules to refer matters to mediation without consent was the subject of an *ultra vires* ruling.³¹ The ruling was the catalyst for the enactment of the *Alternative Dispute Resolution Act 2001* (Tas) ('the *ADR Act*'), which empowered the Court to order parties to participate in dispute resolution and to do so at any stage in the litigation process.³² The *ADR Act* commenced on the 19th September 2001³³ and the Court referred large numbers of matters to mediation to address the problem of the long disposal times for many Supreme Court civil matters.³⁴ The referral practices of the Court are explained further at [3.4] below.

²⁸ *Supreme Court Rules 2000* (Tas) Part 20.

²⁹ *The Supreme Court Rules 2000* (Tas) commenced on 1 May 2000 (r2).

³⁰ *Burke v Humphrey* [2000] TASSC 178 (Unreported, Cox CJ, 18th December 2000).

³¹ *Supreme Court Rules 2000* (Tas) r 518; *Burke v Humphrey* [2000] TASSC 178 (Unreported, Cox CJ, 18th December 2000).

³² *Alternative Dispute Resolution Act 2001* (Tas) s5(1).

³³ *Alternative Dispute Resolution Act 2001* (Tas) s2.

³⁴ According to the figures published in the Chief Justice's Annual Report, in 2002/2003 there were 405 mediations conducted. This compares to the 2001/2002 figure of 302. (Chief Justice Cox, above n7, 8.) The numbers of conferences conducted since 2002-2003 have steadily dropped, reflecting a number of factors including the clearing of matters pending in the court lists. See further discussion at [3.4] below.

2.3 Institutional objectives of court-connected mediation

One of the main motivations of the Supreme Court of Tasmania in implementing its programme was to address ingrained problems of inefficiency within the court system. Mediation has been adopted by the Court for two main reasons: to address the extremely long waiting lists which existed in the early 1990s and to solve problems created by last minute ‘courthouse steps’ settlements. By providing its court-connected mediation programme the Court hoped to encourage settlement to occur earlier in the litigation process, which would deliver benefits to disputants including cost and time savings. There has been a tendency to measure the success of the mediation programme according to the decline in the Court’s waiting lists for trial and rates of settlement at mediation, which usually occurs earlier than the day of trial.³⁵

The government’s objectives in enacting the *ADR Act*³⁶ were also primarily focused on efficiency benefits. When presenting the Alternative Dispute Resolution Bill³⁷ to the Tasmanian Parliament the Minister stated ‘ADR can make a very positive contribution to access to justice because it offers, in its various forms, an inexpensive, informal and speedy means of resolving disputes.’³⁸ However the

³⁵ Factors other than mediation, including more active case management by the judiciary, have also contributed to the decline in court waiting lists. Evidence of the measures of success of the Court’s mediation programme includes: Supreme Court of Tasmania, *Development of Mediation in Tasmania* (2004) < <http://www.courts.tas.gov.au/supreme/mediation/development.htm> > at 14 July 2004; Interviews with Ian Ritchard, then Registrar (Supreme Court of Tasmania, 21 January 2004 and 28 June 2004); Interview with the Honourable Justice Peter Underwood AO (as he then was) (Supreme Court of Tasmania, 17 June 2004); Interview with Stephen Holt, then Master (Supreme Court of Tasmania, 28 June 2004).

³⁶ *Alternative Dispute Resolution Act 2001* (Tas).

³⁷ *Alternative Dispute Resolution Bill 2001* (Tas).

³⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 21st August 2001, 54 (Peter Patmore, Minister for Justice and Industrial Relations).

expectations of Parliament, evidenced by the debate about the Bill, encompassed a broader range of objectives including accessibility, endurance of agreements, cost-neutrality to the courts, improved time management by courts and the removal of tactical advantages of delay.³⁹ Comments addressing these objectives include:

...there is a feeling in the minds of many people as they approach a court situation which is quite off-putting. They find a courtroom situation intimidating. It is extremely difficult for them to perhaps say what they want to say or at least feel that they can say what they might want to say. This more casual approach, where people gather at a table, does have a particular advantage in allowing people to feel that they can engage in a conversation and seek a comfortable answer and of course with the nature of courts and the way they are conducted in a contesting manner, that of course is not always present or is infrequently present because the general ambit of it is to conduct a trial in a different format.⁴⁰

In fact this frees up resources, all of which is cost-neutral from a government point of view because it is just put back into the Supreme Court, but it is not a cost factor.⁴¹

The institutional objectives of the mediation programme are also influenced by the broader policy objectives of the court system outlined in [2.1] above, which means that efficiency alone is an insufficient measure of the performance of the mediation programme. Broader policy objectives also include procedural fairness and accountability, although the Court has not emphasised that these objectives apply to

³⁹ Tasmania, *Parliamentary Debates*, House of Assembly, 21st August 2001, 54 (Peter Patmore, Minister for Justice and Industrial Relations), 54-59; Tasmania, *Parliamentary Debates*, Legislative Council, 29th August 2001, 6-10. In regard to the cost-neutrality to the courts a contradictory statement had been made by the Minister in May 2000 in relation to the enactment of the *Supreme Court Rules 2000* (Tas). 'So these initiatives [case-management and court-directed mediation] will require some additional resources but I believe they will provide a substantial benefit to the Tasmanian community by improving the time it takes to have a matter dealt with.' Tasmania, *Parliamentary Debates*, House of Assembly, 31st May 2000, 94-95 (Peter Patmore, Attorney-General).

⁴⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 21st August 2001 (Denise Swan, Deputy Leader of the Opposition), 56.

⁴¹ Tasmania, *Parliamentary Debates*, House of Assembly, 21st August 2001 (Peter Patmore, Minister for Justice and Industrial Relations), 58.

its mediation programme. The Court has some responsibility to ensure that the mediation process is conducted according to principles of due process and equal protection before the law, as they are overriding objectives of court administration.

The style of mediation to be practised within the Court's programme has not been articulated beyond the broad legislative definition.⁴² No mediation specific guidelines or objectives have been developed legislatively, at common law or in policy documents governing the Supreme Court of Tasmania.⁴³ Lack of clarity in regard to guidelines or standards applying to the Court's mediation programme may make it difficult for participants, including mediators and legal practitioners, to have a clear understanding of its purpose. Astor recommends that individual courts define clear objectives for their court-connected mediation programmes.⁴⁴ Objectives will be specific to each court's programme because of the variety between existing court-connected mediation programmes. However, in most Supreme Court jurisdictions in Australia, no prescription is made in relation to the nature of mediation practice in court-connected programmes and the legislative framework is wide.⁴⁵

⁴² See discussion at [3.1.1] below.

⁴³ There are many standards that have been created by interstate and non-governmental organisations. For example, the following policies relate to fairness: 'a mediator must in no circumstances attempt to coerce the parties to settle a dispute' (Queensland Law Society, *Standard of conduct for solicitor mediators*); 'the mediator should if he/she considers it would facilitate settlement, recommend disclosure of relevant information' (NSW Law Society *Revised Guidelines for Solicitors who act as Mediators*); and 'in mediation and other forms of dispute resolution where solutions are not imposed upon the parties, members are expected to act fairly and in the best interests of all parties' (The Institute of Arbitrators & Mediators Australia, *Practice Note 2 – Professional Conduct*). Cited in National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR: Discussion Paper* (NADRAC, 2000) Appendix 1.

⁴⁴ Hilary Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (2001) Ch 2.

⁴⁵ There appears to be a recent exception to this general trend in the Supreme Court of Western Australia. A Practice Direction was issued by that Court in February 2008 which instructs lawyers that their role in mediation is to support, advise and not to advocate. It provides further that the Court has produced a booklet *Mediation Programme – A Guide for Litigants* which it intends to direct legal practitioners to provide to their clients. This booklet describes the nature of court-connected mediation practice at the Court. See Supreme Court of Western Australia *Practice Direction No 20 of 2008* (21st February 2008) <www.decisions.justice.wa.gov.au/Supreme/SCPracdr> (22nd March 2008), in particular [9] and [26].

The Supreme Court of Tasmania's mediation programme lacks a clear statement of the purposes to be promoted through it. The lack of clarity about the institutional purpose of the mediation programme leaves scope for a combination of individual and institutional interests to be pursued through the mediation programme.

3 Programme characteristics of mediation in the Supreme Court of Tasmania

3.1 Legislative Framework

The two main pieces of legislation applying to the practice of mediation in the Supreme Court of Tasmania are the *ADR Act*⁴⁶ and Part 20 of the Rules.⁴⁷

3.1.1 Legislative definition of mediation

The *ADR Act*⁴⁸ defines mediation as follows:

“mediation”, which includes conciliation, means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.⁴⁹

Because the definition of mediation under the *ADR Act* includes conciliation, the evaluative model of mediation may be practised within Tasmanian court-connected mediation programmes as well as the facilitative, settlement or transformative

⁴⁶ *Alternative Dispute Resolution Act 2001* (Tas).

⁴⁷ *Supreme Court Rules 2000* (Tas).

⁴⁸ *Alternative Dispute Resolution Act 2001* (Tas).

⁴⁹ *Alternative Dispute Resolution Act 2001* (Tas) s 3(2).

models.⁵⁰ The practice style of mediation within the Supreme Court's programme is left largely to the discretion of the mediator and the preferences of the participants. Part 20 of the Rules⁵¹ provides that (subject to guidelines that may be approved by the judges) 'a mediation is to be conducted in any manner the mediator determines.'⁵² As noted above, no guidelines have been set by the judges about the model of mediation that is to be adopted within the Court's programme.

Some matters relevant to the conduct of mediation in the Court are provided for in the legislation. They include referral,⁵³ confidentiality,⁵⁴ selection and immunity of mediators.⁵⁵ Referral is discussed in [3.4] below. The other factors, which are discussed here, impact upon the dilemma of the privacy of mediation conducted within the public institution of justice.⁵⁶

⁵⁰ The terms 'mediation' and 'conciliation' are often used interchangeably, particularly in court-connected programmes. Conciliation is a dispute resolution term that has attracted many conflicting definitions. Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002), 85 & 88. According to the National Alternative Dispute Resolution Advisory Council (NADRAC) a conciliator may have an advisory role in the content of a dispute or the outcome, may make suggestions for terms of settlement, give expert advice on likely settlement terms and may actively encourage the participants to reach an agreement. NADRAC's definition of conciliation is: '...a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted and may make suggestions for terms of settlement, give expert advice on likely settlement terms and may actively encourage the participants to reach an agreement.' A mediator, on the other hand, has no advisory role in regard to the content of the dispute or the outcome. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (NADRAC, 2003) 5 & 9.

⁵¹ *Supreme Court Rules 2000* (Tas).

⁵² *Supreme Court Rules 2000* (Tas) r519(2).

⁵³ *Supreme Court Rules 2000* (Tas) r518; *Alternative Dispute Resolution Act 2001* (Tas) s5(1). See discussion at [3.4] below.

⁵⁴ *Alternative Dispute Resolution Act 2001* (Tas) ss10, 11; *Supreme Court Rules 2000* (Tas) r520.

⁵⁵ *Alternative Dispute Resolution Act 2001* (Tas) ss5(2),(3), 9, 12; *Supreme Court Rules 2000* (Tas) r518(2).

⁵⁶ See Chapter 2 [2.5.3].

3.1.2 Confidentiality and privilege

Provisions in relation to confidentiality and privilege govern communications by both the mediator and other participants. The *ADR Act* provides for specific circumstances in which a mediator may disclose information obtained in connection with a mediation session and outside of which no disclosure may be made.⁵⁷ The circumstances include where the person from whom the information was obtained consents,⁵⁸ where there are reasonable grounds to believe that disclosure is necessary to prevent injury to a person or damage to property⁵⁹ or for the purpose of statistical analysis or evaluation of the mediation programme.⁶⁰ Mediators may only report to the Court the fact that a mediation in a particular matter has been conducted.⁶¹

In regard to confidentiality requirements for other participants in mediation conferences, the legislative provisions are again contained in both the Rules and the *ADR Act*. The Rules provide that:

Anything said or done, any communication or any document created in the course of, or for the purpose of, a mediation is confidential and is not to be disclosed in evidence or otherwise, except on the issue of whether the parties have made a binding agreement settling all or any part of their differences.⁶²

The *ADR Act* contains specific provisions relating to the privilege of documents produced at mediation or in relation to mediation, the inadmissibility of admissions made at mediation and of documents prepared for the purposes of, in the course of or

⁵⁷ *Alternative Dispute Resolution Act 2001* (Tas) s 11.

⁵⁸ *Alternative Dispute Resolution Act 2001* (Tas) s 11(a).

⁵⁹ *Alternative Dispute Resolution Act 2001* (Tas) s 11(c).

⁶⁰ *Alternative Dispute Resolution Act 2001* (Tas) s 11(f).

⁶¹ *Supreme Court Rules 2000* (Tas) r 520(1) & (2).

⁶² *Supreme Court Rules 2000* (Tas) r 520(3).

as a result of mediation.⁶³ Privilege may be waived by the agreement of all relevant parties.⁶⁴ Documents and admissions may be admitted as evidence where there is consent from all relevant parties⁶⁵ or where they are relevant to allegations of fraud.⁶⁶ Documents prepared to give effect to decisions or undertakings made at mediation, such as a consent memorandum or deed of release, are admissible.⁶⁷ The legislative provisions reinforce that court-connected mediation is a private process and that confidentiality will be protected notwithstanding the connection with the formal legal system. Consequently, participants are encouraged to conduct frank discussions under the protection of confidentiality.⁶⁸ Theoretically, this encourages cooperation between parties. Nevertheless, privilege makes it difficult to open mediation to scrutiny by a court, meaning that decisions made at mediation are difficult to challenge. This protection may contribute to the efficiency benefits of mediation by ensuring that agreements reached at mediation are final.

3.1.3 Mediators

The Rules provide that a mediator is to be the principal registrar or a suitable person appointed by the principal registrar.⁶⁹ The *ADR Act* provides that parties may agree on who will mediate a matter but where they cannot agree, the mediator will be the registrar or the registrar's nominee.⁷⁰ There is also provision for the Chief Justice to compile a list of persons considered to be suitable to be mediators for the purposes of the *ADR Act*.⁷¹ Such a list has not been compiled to date.

⁶³ *Alternative Dispute Resolution Act 2001* (Tas) s 10.

⁶⁴ *Alternative Dispute Resolution Act 2001* (Tas) s10(6)(d).

⁶⁵ *Alternative Dispute Resolution Act 2001* (Tas) s10(6)(a).

⁶⁶ *Alternative Dispute Resolution Act 2001* (Tas) s10(6)(c).

⁶⁷ *Alternative Dispute Resolution Act 2001* (Tas) s10(6)(e).

⁶⁸ Some limitations to confidentiality have been observed. See discussion in Chapter 2 [2.1], [4.3.2].

⁶⁹ *Supreme Court Rules 2000* (Tas) r 518(2)

⁷⁰ *Alternative Dispute Resolution Act 2001* (Tas) s 5(2) & (3).

⁷¹ *Alternative Dispute Resolution Act 2001* (Tas) s 9.

Mediators conducting mediations under the *ADR Act* are immune from prosecution regarding matters or things done ‘in good faith for the purposes of a mediation session.’⁷² This is consistent with provisions in other jurisdictions which protect mediators in the same way that judicial officers are immune from prosecution.⁷³

Immunity from prosecution has been criticised because it means that mediators are not held accountable for the standard of mediation provided.⁷⁴ Furthermore, as mediators do not perform the judicial function of determination of disputes, the rationale for granting them immunity has been questioned.⁷⁵ Some mediator immunity provisions have been repealed. For example, in 2006 family dispute resolution practitioners in Australia ceased to enjoy statutory immunity.⁷⁶

The argument against immunity becomes confused when mediators evaluate or provide an opinion, activities which make their role closer to determination than the process oriented mediator. To the extent that a court-sponsored mediator provides a legal opinion or quasi-judgment, there are questions about whether or not the mediator ought to enjoy immunity. If not, inquiry to ascertain whether or not the opinion was adequate would be frustrated by the privacy of mediation.⁷⁷

⁷² *Alternative Dispute Resolution Act 2001* (Tas) s 12.

⁷³ See for example *Civil Procedure Act 2005* (NSW) s33; *Supreme Court Act 1935* (SA) s 65(2); *Supreme Court of Queensland Act 1991* (Qld) s 113(1).

⁷⁴ Robyn Carroll, 'Mediator Immunity in Australia' (2001) 23 *Sydney Law Review* 185, 187. 'The greater the immunity conferred on mediators, the more pressing becomes the question of how to ensure that consumers are receiving appropriate and acceptable standards of mediation.'

⁷⁵ Carroll (2001), above n74, 207. 'By definition, a mediator does not sit in judgment of the parties or determine the outcome of the mediation so there should be no need for immunity, and to the extent the mediator does perform quasi-judicial functions, can they be said to be a mediator at all?'

⁷⁶ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

⁷⁷ See discussion of problems with mediator evaluation in Chapter 2 [3.3.4].

In any event, there are few limitations to what mediators can do in the mediation programme, which leaves little scope for complaint about mediator conduct.

3.2 Location

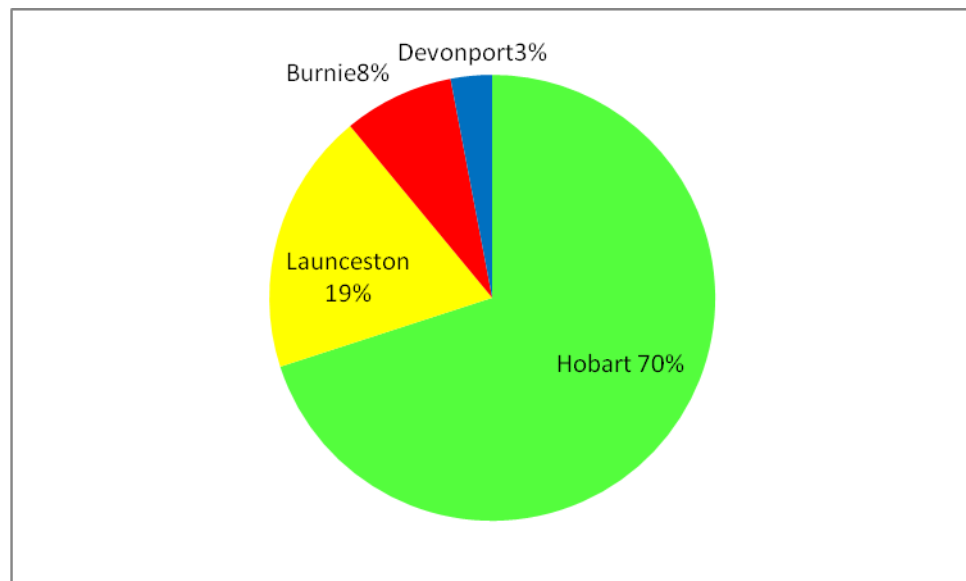
Court-connected mediation is sometimes held on court premises. For example: in the Local Court of Western Australia, Ohio courts and the Metropolis County Superior Court.⁷⁸ In other court-connected programmes the mediation sessions are held off-site. For example, mediations in the 1992 Settlement Week programme in New South Wales and in the Toronto mandatory mediation programme were predominantly held in offices, including lawyers' offices.⁷⁹

Mediation conferences in the Supreme Court of Tasmania are held at each of the three Supreme Court registries and also at the Magistrates' Court building in Devonport (North-West region). The proportion of mediations held at each of the four locations between 1st July 1999 and 30th June 2006⁸⁰ is summarised in the following chart:

⁷⁸ Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9 (2) *Murdoch University Electronic Journal of Law* <www.murdoch.edu.au/elaw/issues/v9n2/howieson92_test.htm>; Roselle Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal of Dispute Resolution* 641; Stacy Lee Burns, *Making Settlement Work: An examination of the work of judicial mediators* (Ashgate Publishing Company, 2000).

⁷⁹ Christine Chinkin and Micheline Dewdney 'Settlement Week in New South Wales: An Evaluation' (1992) 3 *Australian Dispute Resolution Journal* 93; Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009).

⁸⁰ Excluding 1 July 2002 to 30 June 2003 as the Court database is incomplete in relation to that financial year. See further discussion at n86.

Chart 3.2⁸¹**Mediations held in various locations between 1 July 1999 and 30 June 2006⁸²**

Source: Court database

The existing court buildings accommodate the mediations. The mediation rooms contain a round table around which the participants are seated, typically with the legal practitioners on either side of the mediator and the disputants beside the lawyers. Tea and coffee provisions are located on a table in the room. This compares favourably to the Metropolis County Superior Court, where instant coffee must be purchased from the court's cafe and none is provided to mediating parties.⁸³ By comparison, the Supreme Court of Tasmania's facilities are welcoming and relaxing.

⁸¹ N=1730. Hobart N=1221; Launceston N=321; Burnie N=133; Devonport N=55.

| | Hobart | Launceston | Burnie | Devonport |
|-----------|--------|------------|--------|-----------|
| 1999/2000 | 68% | 25% | 6% | 1% |
| 2000/2001 | 64% | 21% | 10% | 5% |
| 2001/2002 | 74% | 16% | 8% | 2% |
| 2003/2004 | 76% | 14% | 7% | 4% |
| 2004/2005 | 73% | 17% | 6% | 4% |
| 2005/2006 | 65% | 22% | 9% | 4% |

⁸² Excluding 2002/2003 – see note 86.

⁸³ Burns (2000), above n78.

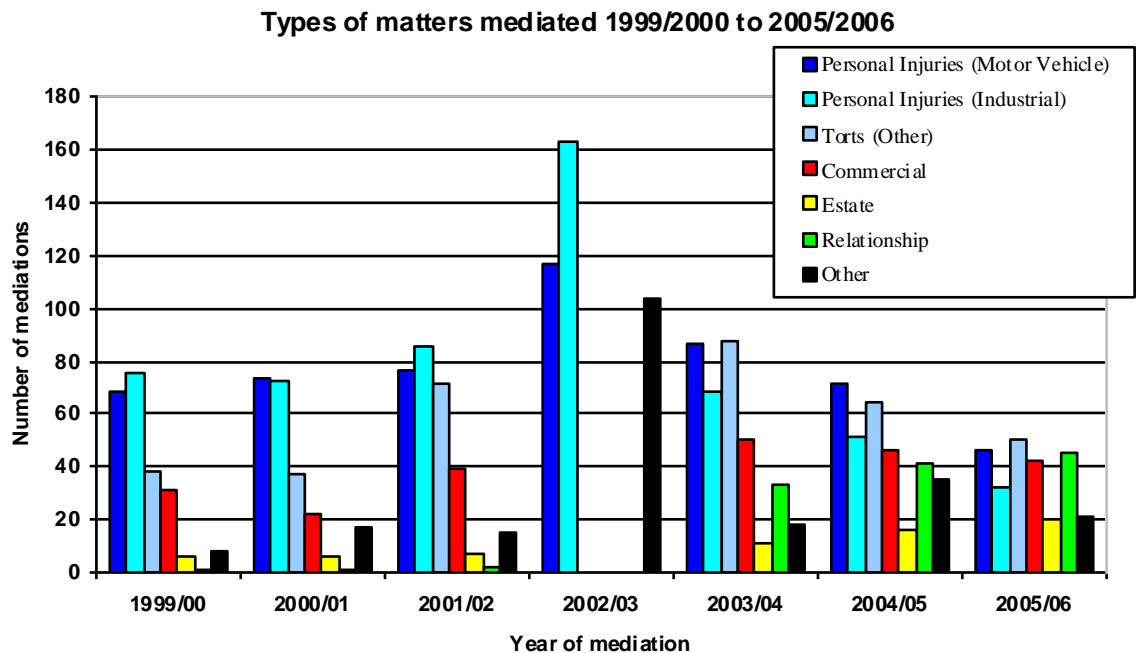
There are some improvised ‘break out’ rooms that are used when private sessions are held during the mediation. However, because the mediation rooms have been created by the retro-fitting of rooms within an existing building rather than being specifically built to purpose, there are some deficiencies in the design of the physical environment. A matter of concern is the lack of suitable ‘break-out’ rooms to which disputants can go to consult with their lawyer in private. Consequently, such consultations often occur in the public waiting area outside the courts. This is clearly a problem because it denies participants a private space in which to consider their options.⁸⁴

3.3 Nature of disputes

Mediations are conducted in most types of disputes litigated in the Court. The following chart outlines the numbers of various types of matters⁸⁵ mediated between the financial years 1999/2000 and 2005/2006:

⁸⁴ Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed, 2003) 155.

⁸⁵ The relevant case codes for each of the categories of case type contained in this chart are:
Personal Injuries (Motor Vehicle) Case Codes 301, 309 and 728.
Personal Injuries (Industrial) Case Codes 302 and 719.
Torts (Other) Case Codes 317, 318, 303, 319, 320, 321, 304, 305, 322, 323, 306, 308, 401 and 501.
Commercial Case Codes 102, 201, 203 and 204.
Estates Case Codes 602, 706 and 712.
Relationships Case Codes 783 and 774.
Other = All remaining case codes.
See Appendix D for a copy of the list of Case Codes provided by the Court.

Chart 3.3⁸⁶

Sources: Court database and Chief Justice Cox, 'Report of the Chief Justice of the Supreme Court of Tasmania: Annual Report 2002-2003' (Supreme Court of Tasmania, 2003)

Chart [3.3] illustrates the high proportion of torts claims mediated in the programme between 1999 and 2006. As noted above, between 1992 and 1995 personal injuries actions that involved the Motor Accidents Insurance Board (MAIB) were the only matters that were sent to mediation. From 1995 a wider variety of matters were referred to mediation, with the consent of all parties, including industrial personal injuries claims, other torts, such as professional negligence claims, and commercial

⁸⁶ The figures for this chart are derived from the court database for all financial years other than 2002/3, the figures for which are taken from the Chief Justice's Annual Report. It is acknowledged that there are inconsistencies between the Court's database and the Annual Reports which have been published by the Chief Justices. The Annual Reports published the overall numbers of mediations held between 1999/2000 and 2004/2005. The discrepancies in the overall numbers published were 1 in 1999/2000, 23 in 2000/2001, 5 in 2001/2002, 169 in 2002/2003, 3 in 2003/2004 and 2 in 2004/2005. The Court has been unable to explain these inconsistencies. I have chosen to use the database figures so that they are consistent with other data presented in this chapter except for the year 2002/2003, because I suspect that some mediator forms were misplaced for that year between the publication of the Annual Report and the creation of the database. I am not able to provide further explanation for the difference between the figures published by the Court and the figures produced from the Court's database. Because there is no breakdown of matter types other than 'personal injuries motor vehicle,' 'personal injuries industrial' and 'other' matters in the Annual Report, details of 'other' matters cannot be ascertained. See Chief Justice Cox (2003), above n7.

matters. From 1999 the Court actively encouraged mediation in a variety of matters, although there was no legitimate power to mandate referral until 2001.⁸⁷ Chart [3.3] demonstrates that as the mediation programme was formalised, a greater diversity of matters were referred to mediation. However, torts claims continue to represent the majority of mediated claims. Personal injuries cases also comprised the majority of cases mediated in programmes examined in the Supreme Court of New South Wales Settlement Week 1992, Central London County Court, Judicial Circuit of Illinois, Ohio courts and North Carolina courts.⁸⁸

The numbers of non-torts matters mediated rose significantly from 2002 after the Court had obtained the power to refer all disputes to mediation. The sharp rise in the number of matters mediated in 2002/2003, as depicted in Chart [3.3], was explained by the then Chief Justice as being due to the processing of the backlog of cases awaiting trial at the Court.⁸⁹ The Court referred large numbers of its pending matters to mediation to try to reduce its backlog. The decline in the numbers of matters mediated since 2002 is partly explained by the successful processing of the backlog of old cases, which meant that fewer matters were pending within the Court's system.

⁸⁷ The *ADR Act* came into effect on the 19th September 2001. [*Alternative Dispute Resolution Act 2001* (Tas).] The Court exercised the power of referral under the Rules during 2000, however the power was successfully challenged in the case of *Burke v Humphrey*. [*Burke v Humphrey* [2000] TASSC 178 (Unreported, Cox CJ, 18th December 2000).]

⁸⁸ Chinkin and Dewdney (1992), above n79; Professor Dame Hazel Genn, Professor Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Grey, Dev Vencappa, 'Twisting arms: court referred and court linked mediation under judicial pressure' (Faculty of Laws, University College London, University of Nottingham Business School, 2007); Keith Schildt, James J Alfini and Patricia Johnson, 'Major Civil Case Mediation Pilot Program: 17th Judicial Circuit of Illinois' (College of Law, Northern Illinois University, 1994); Wissler (2001-2002), above n82; Stevens H Clarke, Elizabeth D Ellen and Kelly McCormick, 'Court Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects' (North Carolina Administrative Office of the Courts, 1995).

⁸⁹ Chief Justice Cox (2003), above n7.

Amendments to the *Workers Compensation and Rehabilitation Act*⁹⁰ in 2001 and the *Civil Liability Act 2002* (Tas) may also have had a downward impact on the numbers of personal injuries matters filed at the Court because this legislation imposed a 30% whole of body impairment restriction and restrictions on the general damages that can be claimed in personal injury worker's compensation matters.⁹¹ The fall in the number of common law claims filed explains in part the decline of personal injuries matters mediated during the 2000s.

In contrast, the *Relationships Act 2003* (Tas) resulted in a steady increase in the number of relationship disputes referred to the Court and to mediation. The number of estate matters, including testator's family maintenance claims and probate matters referred to mediation also increased steadily from 2003. The number of commercial disputes referred to mediation has declined slightly since 2003. This may indicate that the backlog of commercial matters has reduced since the *ADR Act* was enacted and the number of commercial mediations has settled to a steady amount of just over forty per annum.

3.4 Referral practices

3.4.1 Matters referred to mediation

The power to refer matters to mediation in the Supreme Court of Tasmania is consistent with other Australian Supreme Court jurisdictions.⁹² The Court has

⁹⁰ *Workers Rehabilitation and Compensation Act 1988* (Tas) s138AB(2).

⁹¹ *Workers Rehabilitation and Compensation Act 1988* (Tas) s138AB(2); *Civil Liability Act 2002* (Tas) s27. Leanne Topfer, 'From the President' (2006) 91 *Law Letter* 4: 'The fact is, that access to common law damages for workers is all but destroyed in Tasmania – only six people have reached the threshold since 2001.'

⁹² *Alternative Dispute Resolution Act 2001* (Tas) s 5(1); *Supreme Court Rules 2000* (Tas) r 518(1); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r50.07; *Civil Procedure Act 2005* (NSW) s 26; *Supreme Court of Queensland Act 1991* (Qld) ss102, 103; *Uniform Civil Procedure*

demonstrated that it is willing to exercise that power. The Court has an informal policy that a trial date ought not be allocated unless a matter has been referred to mediation.⁹³ Where persuaded by the parties that mediation would not be appropriate the Court will depart from this norm. However, the Court will not usually initiate referral to mediation until a matter is almost at trial.⁹⁴ In cases that are at the stage of being set down for trial, disputants may make a case before the Associate Judge as to why a matter ought to be allocated a trial date without being referred to mediation. The statistics presented in [6.1.3] below demonstrate that the Associate Judge is willing to allocate trial dates without referral to mediation.

The Court has not developed any referral criteria beyond the broad legislative requirement that ‘the court considers the circumstances appropriate.’⁹⁵ The Associate Judge’s discretion is therefore very wide regarding the grounds upon which referral can be resisted. In the Associate Judge’s⁹⁶ opinion as expressed in 2004 (when his title was ‘Master’), personal injuries matters are suitable and usually settle at mediation.⁹⁷ In his experience family matters are suitable to mediate and rarely go before the judges, but in practice they usually settle without mediation.⁹⁸ He also generally referred commercial matters but may not have referred matters which he regarded as being highly complex or which involved a particularly large amount of

Rules 1999 (Qld) Ch 9, Part 4; *Rules of the Supreme Court 1971* (WA) Order 29 r 2; *Supreme Court Rules* (NT) r 48.13; *Supreme Court Act 1935* (SA) s65(1); *Civil Law (Wrongs) Act 2002* (ACT) s195.

⁹³ Interview with The Honourable Justice Peter Underwood AO (as he then was) (Supreme Court of Tasmania, 21st June 2004). ‘The practice of the Court is to refer all matters to mediation before a trial date will be given. If necessary, that will be ordered by the Court.’

⁹⁴ Interview with Stephen Holt, then Master (Supreme Court of Tasmania, 28th June 2004). This policy is consistent with some other court referral policies. See for example: County Court of Victoria (Sourdin (2009), above n5); Metropolis County Supreme Court (Burns (2000), above n78).

⁹⁵ *Alternative Dispute Resolution Act 2001* (Tas) s 5(1).

⁹⁶ See above n6.

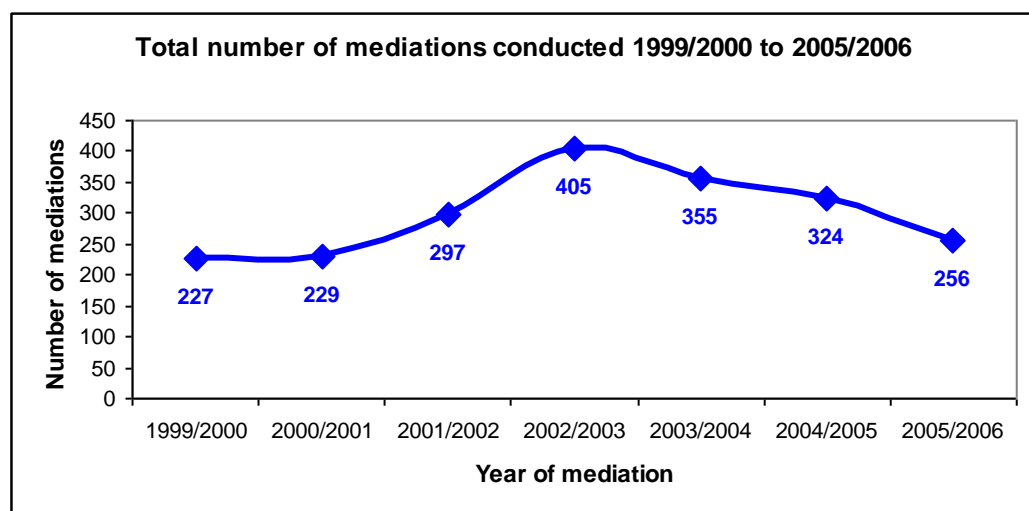
⁹⁷ Interview with Stephen Holt, then Master (Supreme Court of Tasmania, 28th June 2004).

⁹⁸ Interview with Stephen Holt, then Master (Supreme Court of Tasmania, 28th June 2004).

money and where one or more of the parties opposed the making of an order referring the matter to mediation.⁹⁹ Furthermore, he commented that in such matters where the parties are represented by senior counsel who are capable of arguing a complex matter in court then the assistance of a mediator is often not necessary.¹⁰⁰ This comment recognises that mediation can sometimes be helpful in clarifying the issues in complex matters which are destined to go to trial, but mediation may not be necessary to achieve such clarification.

The overall number of matters mediated each year between 1 July 1999 and 30 June 2006 are shown in chart [3.4A].

Chart 3.4A¹⁰¹



Source: Court database and Chief Justice Cox, 'Report of the Chief Justice of the Supreme Court of Tasmania: Annual Report 2002-2003' (Supreme Court of Tasmania, 2003)

This chart demonstrates the rapid rise in the number of mediations since the implementation of the *Supreme Court Rules 2000* (Tas) and the *Alternative Dispute Resolution Act 2001* (Tas). The initial enthusiastic referral of matters to mediation

⁹⁹ Interview with Stephen Holt, then Master (Supreme Court of Tasmania, 28th June 2004).

¹⁰⁰ Interview with Stephen Holt, then Master (Supreme Court of Tasmania, 28th June 2004).

¹⁰¹ The court database figures have been relied upon for all years except 2002/2003, which has been taken from the Chief Justices' Annual Report for that year. See above n86.

has, however been followed by a gradual decline in the number of referrals. In part, this trend is consistent with the clearing of the Court's pre-existing backlog once it obtained the power of compulsory referral.¹⁰² The trend is also consistent with the following lawyer's observation that over time there has been a movement away from referral to mediation in all cases:

Now the judges, well for a while they seemed to take the view that they wouldn't list anything for trial unless there had been a mediation. I think there has been a move away from that now. It appears that you can get around that and you can get listed without going to a registrar's conference.¹⁰³

The proportion of the overall number of mediations that were referred by consent or order has been consistent since the Court obtained the power to refer matters to mediation without consent. Referral is made by court order in approximately 18% of mediated matters. The relevant percentages were 19% in 2003/2004, 17% in 2004/2005 and 18% in 2005/2006. Referral orders were not necessarily opposed by the parties. Matters that were referred by court order included cases where the then Master or a judge suggested mediation and the parties agreed to that suggestion, as well as those matters where one or both parties objected to the referral.¹⁰⁴ Therefore, at least 82% of the referral decisions in the Supreme Court of Tasmania are made by the disputants and their lawyers rather than by the Court. The actual percentage of consensual referrals cannot be determined, but is larger than 82%.

Although most matters are referred by consent, this may reflect an expectation that the Court will refer the matter to mediation in any event, rather than enthusiastic

¹⁰² See [3.3] above.

¹⁰³ Lawyer 15.

¹⁰⁴ Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, 28th June 2004).

voluntary participation in mediation.¹⁰⁵ Court-connected mediation could be viewed as one of many processes that must be completed before a matter will go to trial. Some practitioners believe that the Court will exercise the power of referral.¹⁰⁶ For example, the following legal practitioner does not consider that voluntariness is an issue:

I think the whole culture of conducting dispute resolution has changed. I've been in practice now for seventeen years and at the beginning, it really was the exception rather than the rule. Whereas now, it's almost, certainly in the Supreme Court jurisdiction and in all the tribunal jurisdictions, it's ubiquitous, I mean, there is no option. So it is a process that is always gone through whether or not the matter ultimately ends up in court. I think at least it's going to be trialled and the court will direct it even if the parties don't choose it. The issue of voluntariness I think doesn't really arise now.¹⁰⁷

The Court has demonstrated a willingness to exercise its power of referral, although there may have been a shift over time to a more cautious exercise of that power. The possibility of referral by the Court appears to influence some consensual referrals to mediation.

3.4.2 Timing

Referral timing

There are no programme guidelines about the timing of referral. Because most matters are referred to mediation by consent, the timing of referral is largely determined by the legal practitioners representing disputants. Sometimes the

¹⁰⁵ Tania Sourdin, 'Making People Mediate. Mandatory Mediations in Court-connected Programmes' in David Spencer and Tom Altobelli (eds), *Dispute Resolution in Australia: Cases, Commentary and Materials* (2005) 147.

¹⁰⁶ Lawyers 6, 21, 27, 31, 35, 37 and 41 made comments that indicated that they consider mediation to be a compulsory part of the process in the Supreme Court and that the Court will use its power of referral in the absence of consensual referral.

¹⁰⁷ Lawyer 21.

Associate Judge initiates referral to mediation or decides when there is a dispute between the parties about the appropriateness of referral. In 2004 the then Master indicated that he generally referred matters after the exchange of information that both parties need in order to negotiate.¹⁰⁸ That information includes discovery and interrogatories where appropriate. At that time he preferred to refer matters involving small amounts of money earlier in the court proceedings.¹⁰⁹ These practices may have changed since 2006, with some types of matter now being referred at earlier stages in litigation. During the period of this research, however, earlier mediation was usually initiated by the parties.

Mediation timing

Mediators recorded on the mediator forms the stage of the litigation at which mediation was conducted according to four categories: ‘very early’, ‘pleadings closed’, ‘judges papers filed’ and ‘set down for hearing.’ Those matters that were referred ‘very early’ were generally mediated within four months of the date of filing.¹¹⁰ Usually in those cases the only documents that had been filed were the Writ and Defence. Those matters that were mediated at the stage where ‘pleadings closed’ usually occurred eighteen months or more after the date that the Writ was filed.¹¹¹ In those matters lots of documents had been filed but no Certificate of Readiness. Where a mediation occurred at the stage ‘judges papers filed,’ the matter had been certified ready for trial, usually by the filing of a Certificate of Readiness.¹¹² Finally, those matters that were mediated when ‘set down for hearing’ were those matters in which the matter had been certified ready for trial and a hearing date had been

¹⁰⁸ Interview with Stephen Holt, then Master (Supreme Court of Tasmania, 28th June 2004).

¹⁰⁹ Interview with Stephen Holt, then Master (Supreme Court of Tasmania, 28th June 2004).

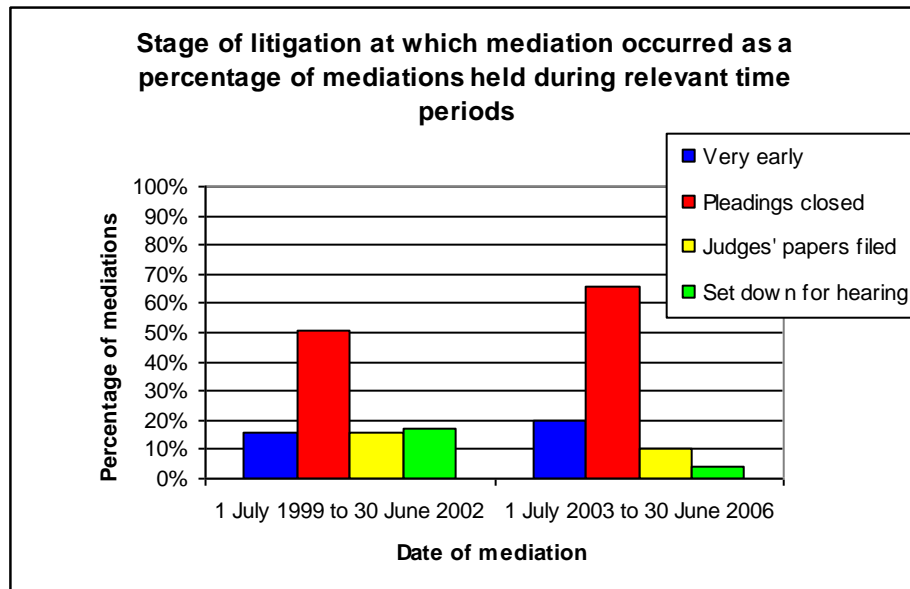
¹¹⁰ Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, 28th June 2004).

¹¹¹ Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, 28th June 2004).

¹¹² Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, 28th June 2004).

allocated.¹¹³ The following chart sets out information derived from the Court database which reveals the percentage of cases referred to mediation at these different stages:

Chart 3.4B¹¹⁴



Source: Court database

Chart [3.4B] reveals that during the years since mediation began to be formalised at the Court, an increased proportion of matters were referred to mediation at an earlier stage of proceedings. A larger proportion of matters were referred between the date of filing and the close of pleadings. The proportion increased from a total of 67% between 1999 and 2002 (the years of formalisation-settling in) to 86% between 2003 and 2006 (the years after formalisation).¹¹⁵ The percentage of mediations that were held at the stage that a matter had been set down for hearing fell over this time from 17% to 4%. These results indicate that over time there has been increased willingness by legal practitioners and the Associate Judge to refer matters to mediation at an

¹¹³ Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, 28th June 2004).

¹¹⁴ 1999 to 2002 N=627; 2003 to 2006 N=736.

¹¹⁵ The three year periods analysed in this chapter are defined in [3.4.3] below and Chapter 3 [3].

earlier stage in the litigation process. The trend illustrated in Chart [3.4B] may also reflect the successful disposal of a backlog of older matters in the early 2000s, the result of which is that both legal practitioners and the Court are able to progress cases earlier in their litigation journey. For legal practitioners this may mean earlier attention to settlement options and the strengths and weaknesses of a particular legal position, making cases ready for mediation at an earlier stage. A further factor that may have contributed to the trend demonstrated in Chart [3.4B] is the development of an expectation that mediation is a normal part of the litigation process and often an end point for litigated matters.

Mediation in the Supreme Court of Tasmania occurs after litigation has commenced and the overwhelming majority of mediations in the Court occur after the exchange of pleadings. Pleadings are positional statements about the facts relating to the dispute. Although it has become more likely over time that mediation will occur earlier in the proceedings, referral most often occurs at the close of pleadings rather than in the very early stages of the litigation.

The actual referral timing shown in Chart [3.4B] demonstrates that more referrals are occurring at the close of pleadings than when a trial date is imminent. At the close of pleadings the disputants are likely to be entrenched in their positions and to have invested considerable effort and money in the legal action, but may not have all of the relevant information available to them. The legal issues between the disputants have been defined. Settlement at that stage of the litigation will save the costs of preparing further for trial.

Significance of timing

Decisions about the timing of mediation require a balancing exercise and there are no clear guidelines within theoretical, policy or empirical mediation literature as to the best time to mediate.¹¹⁶ Although it is widely agreed that there is no easily identifiable preferable time for mediation,¹¹⁷ '[t]he preponderant view in practice is probably that mediation should take place sooner rather than later in the life of a dispute, but that delay will never be a reason in itself not to attempt it.'¹¹⁸ Referral to mediation at an earlier stage in proceedings maximises the benefit of efficiency by providing an early opportunity to settle the litigation.

There are a number of factors that favour mediation in the earlier stages of a dispute. They include the extent of the escalation of the dispute, the degree to which the disputants are entrenched in their positions and the costs to the disputants including time, emotional and financial costs.¹¹⁹ All of these factors tend to escalate over time and therefore can be minimised by early mediation. Other factors that favour early mediation include the maximisation of the chance to preserve the relationship between the disputants and the opportunity to make interim short-term arrangements until the disputants are ready to negotiate a long term enduring agreement.¹²⁰ The longer the time between the emergence of the dispute and mediation, the more likely it is that the disputants will have very fixed positions and expectations about the resolution of the dispute.

¹¹⁶ Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 259-262.

¹¹⁷ Kathy Mack, 'Court Referral to ADR: Criteria and Research' (National ADR Advisory Council and Australian Institute of Judicial Administration, 2003) [5.3]; Tania Sourdin, *Alternative Dispute Resolution* (2nd ed, 2005) [6.260]; Boulle (2005), above n116, 259-262.

¹¹⁸ Boulle (2005), above n116, 260.

¹¹⁹ Boulle (2005), above n116, 259-262.

¹²⁰ Boulle (2005), above n116, 259-262.

On the other hand, there are some factors that favour later referral to mediation. They include: whether the disputants are emotionally ready to negotiate in relation to the dispute, whether the disputants are able to identify the issues of dispute and whether there is enough information available with which they can negotiate effectively.¹²¹

Information may be obtained by investigations or other fact finding exercises, production of expert reports or the exchange of materials. The passage of time enables such information to be obtained and shared. It also allows any injuries that are the subject matter of a dispute to stabilise so that the extent of damages can be more accurately anticipated. Late referral to mediation tends to be preferred within the context of litigation, where evidence is of particular importance. Furthermore, referral to mediation at the eleventh hour in a litigation process can provide exhausted disputants with an option other than trial.¹²²

Mediation literature generally promotes the benefits of early mediation. For example, Sourdin has recommended in her investigation into court-connected mediation programmes in the Supreme and County Courts of Victoria that young disputes be referred to mediation earlier.¹²³ She found that in the Supreme Court of Victoria, referral usually took place three-quarters of the way through the litigation process. Despite such recommendations, in court-connected mediation, referral to mediation occurs relatively late in the life of the dispute. In the District and Supreme Courts of New South Wales, Sourdin and Matruglio found that the median dispute age was three years.¹²⁴ Mixed referral practices have been observed internationally. Referral

¹²¹ Boulle (2005), above n116, 259-262.

¹²² Boulle (2005), above n116, 259.

¹²³ Sourdin (2009), above n5.

¹²⁴ Sourdin and Matruglio (2002), above n5.

is late in the voluntary ADR Chambers scheme in Toronto and the Metropolis County Superior Court.¹²⁵ Referral tends to occur earlier in the Ontario Mandatory Mediation Programme (between 90 and 150 days after the filing of a defence), the Toronto version of that programme (prior to discoveries) and in the Ohio Courts (median timing of mediation eight months after the case was filed).¹²⁶ In the Saskatchewan Queen's Bench referral is routine and mediation is usually held at the close of pleadings, prior to formal discovery.¹²⁷

The general preference for court-connected mediation to occur late in the life of the dispute rather than soon after the filing of an action reflects the emphasis on the law. When the value of achieving outcomes that accord with the law is prioritised, a certain maturity in the development of the legal case is beneficial. It was noted in the Saskatchewan Queen's Bench that mediation occurred relatively early and was conducted in a facilitative, interest-based style.¹²⁸ There were indications that lawyers would appreciate a more evaluative style of process to be available later in the litigation process.¹²⁹ This supports the conclusion that when mediation occurs later in the life of the litigation process, an evaluative style becomes more relevant as the legal cases have been defined.

¹²⁵ Relis (2009), above n79; Burns (2000), above n78.

¹²⁶ Robert G Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans, 'Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1). Final Report – The First 23 Months (Robert Hann and Associates Limited/Ontario Ministry of the Attorney-General, 2001); Relis (2009), above n79; Wissler (2001-2002), above n78.

¹²⁷ Julie Macfarlane and Michaela Keet, 'Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a maturing program' (2005) 42(3) *Alberta Law Review* 677.

¹²⁸ Macfarlane and Keet (2005), above n127.

¹²⁹ Macfarlane and Keet (2005), above n127.

3.4.3 Proportion of matters mediated

Litigation may be finalised in a number of ways, including negotiated settlement, discontinuance or judicial determination. Some calculations were made from the finalised matters¹³⁰ filed in the Hobart Registry, to ascertain the proportion of finalised matters that were mediated.¹³¹ The following table shows the number of finalisations in various categories of matters and the number of finalised matters that were and were not referred to mediation. Three time periods are included:

- 1996 to 1999 when conferencing was still emerging as a dispute resolution option at the Court ('the years prior to formalisation');
- 1999 to 2002 which represents the first period of formal and widespread referral to mediation ('the years of formalisation-settling in');¹³² and
- 2003 to 2006 being three years after the *ADR Act* commenced ('the years after formalisation').¹³³

The table shows that the overwhelming majority of finalisations occurred without referral to mediation in all three periods. The proportion and number of matters that were mediated in the major categories of tort and commercial matters rose over time. More matters were mediated in the final time period even though the number of finalisations in tort and commercial matters fell.

¹³⁰ Finalised matters are those in which a date of finalisation was recorded on the Court database. They included finalisations by judgment (both consent and by order of the Court), discontinuance and apparent abandonment.

¹³¹ Restriction to the Hobart Registry is necessary because finalisations are more accurately recorded in the Court database for Hobart matters. Many informal settlements were recorded on the registry supervisor's cards, which primarily relate to Hobart listings. See Chapter 3 [3.3].

¹³² This period includes the Court's expansion of the types of matters in which it encouraged mediation, the introduction of the Rules in 2000 and of the *ADR Act* in 2001.

¹³³ The three year periods analysed in this chapter are also defined in Chapter 3 [3].

Table 3.4C**Hobart finalisations and whether the matter was referred to mediation or not**

| | | Tort ¹³⁴ | Commercial ¹³⁵ | Estate ¹³⁶ | Other ¹³⁷ | Total: All types of matter |
|------------------------------|---------|---------------------|---------------------------|-----------------------|----------------------|----------------------------|
| Finalised | | 1538 | 1394 | 10 | 368 | 3310 |
| 1/7/1996 to 30/6/1999 | | | | | | |
| Mediated | Number | 220 | 28 | 2 | 15 | 265 |
| | Percent | 14% | 2% | 20% | 4% | 8% |
| Not Mediated | Number | 1318 | 1366 | 8 | 353 | 3045 |
| | Percent | 86% | 98% | 80% | 96% | 92% |
| Finalised | | 1649 | 379 | 22 | 392 | 2442 |
| 1/7/1999 to 30/6/2002 | | | | | | |
| Mediated | Number | 376 | 41 | 9 | 19 | 445 |
| | Percent | 23% | 10% | 41% | 5% | 18% |
| Not Mediated | Number | 1273 | 338 | 13 | 373 | 1997 |
| | Percent | 77% | 89% | 59% | 95% | 82% |
| Finalised | | 1200 | 364 | 87 | 1202 | 2853 |
| 1/7/2003 to 30/6/2006 | | | | | | |
| Mediated | Number | 398 | 76 | 32 | 88 | 594 |
| | Percent | 33% | 21% | 37% | 7% | 21% |
| Not Mediated | Number | 802 | 288 | 55 | 1114 | 2259 |
| | Percent | 67% | 79% | 63% | 93% | 79% |

Source: Court database

¹³⁴ Case Codes 301, 309, 728, 302, 719, 317, 318, 303, 319, 320, 321, 304, 305, 322, 323, 306, 308, 401 and 501. See Appendix D for a copy of the list of Case Codes provided by the Court.

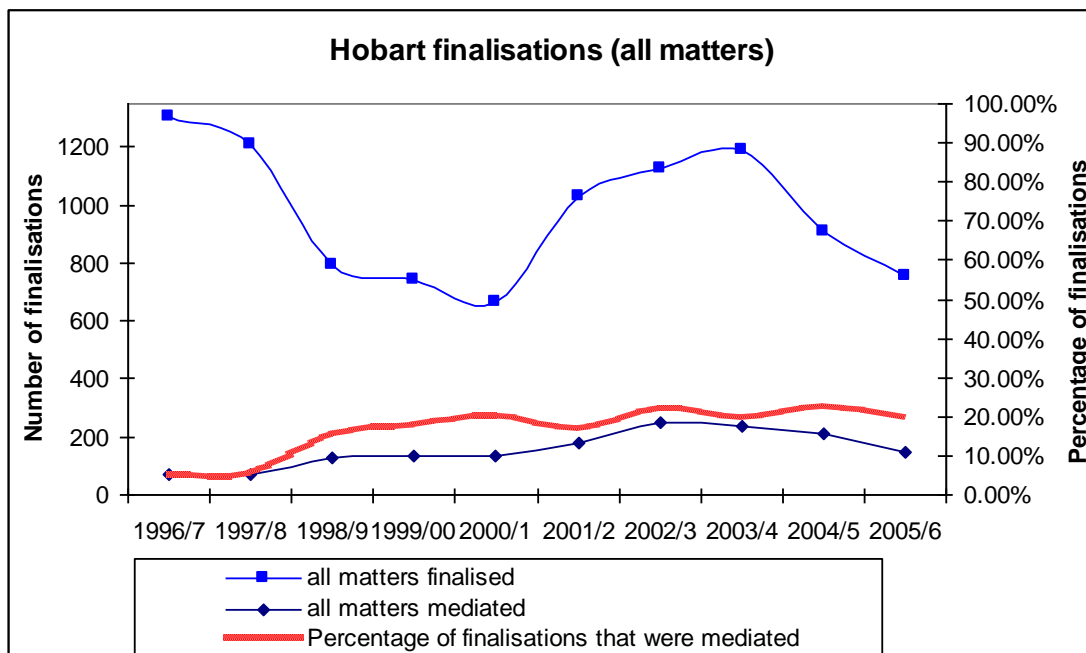
¹³⁵ Case Codes 102, 201, 203 and 204. See Appendix D for a copy of the list of Case Codes provided by the Court.

¹³⁶ Case Codes 602, 706 and 712. See Appendix D for a copy of the list of Case Codes provided by the Court.

¹³⁷ All other Case Codes, including Relationships codes 783 and 774. See Appendix D for a copy of the list of Case Codes provided by the Court.

The following Chart [3.4D] demonstrates that the percentage of matters that were mediated has remained relatively steady since the early years of formalisation-settling in at around 20% of all Hobart finalisations. The proportion of finalised matters that were referred to mediation in the three time periods represented in Table [3.4C] were 8% between 1996 to 1999, 18% between 1999 and 2002 and 21% between 2003 and 2006. This suggests that the formalisation of mediation has increased the proportion of matters referred to mediation by over 10%.

Chart 3.4D¹³⁸



Source: Court database

¹³⁸ Ns for each year are as follows:

| | Total Hobart finalisations | Hobart finalisations referred to mediation |
|-----------|----------------------------|--|
| 1996/1997 | 1304 | 68 |
| 1997/1998 | 1212 | 71 |
| 1998/1999 | 794 | 126 |
| 1999/2000 | 744 | 133 |
| 2000/2001 | 665 | 136 |
| 2001/2002 | 1033 | 176 |
| 2002/2003 | 1126 | 252 |
| 2003/2004 | 1191 | 238 |
| 2004/2005 | 910 | 208 |
| 2005/2006 | 752 | 148 |

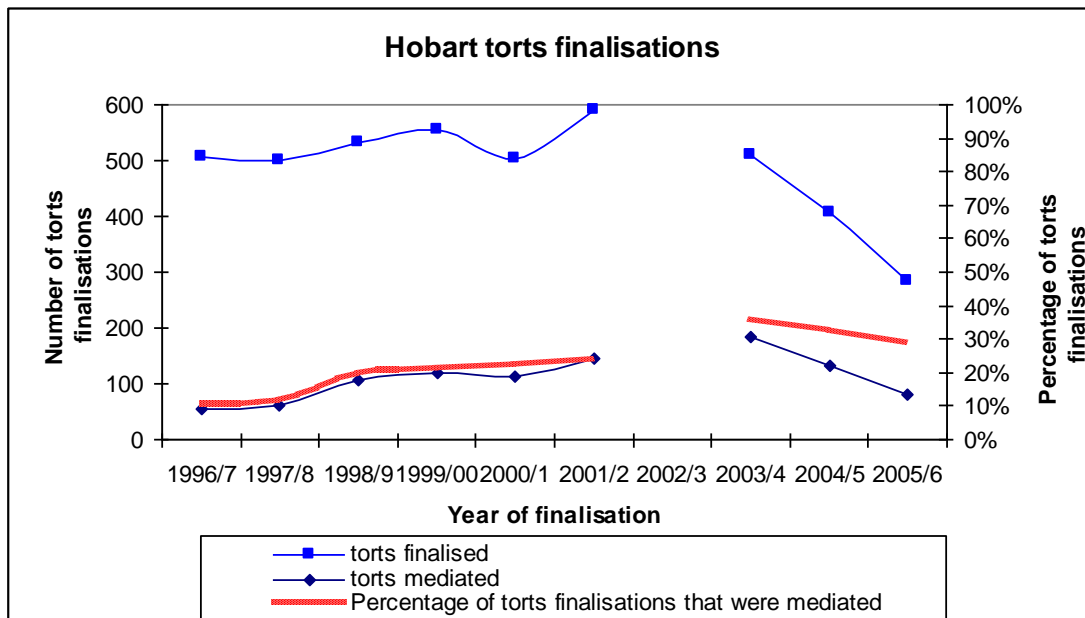
On the other hand, the overall number of finalisations has fluctuated over time. Some of the steep movements can be explained. The fall between 1997/8 and 1998/9 coincided with the increase of the jurisdictional limit of the Magistrates Court to \$20,000.¹³⁹ The increased jurisdiction meant that many matters proceeded in the Magistrates Court rather than being finalised in the Supreme Court. The number of finalisations rose sharply between 2000/1 and 2001/2, during which time the Court implemented a pro-active case management regime in which high numbers of pending matters were listed for a Directions Hearing. Consequently, many matters were processed during the early 2000s. That process slowed down after 2003, when there was reduced pressure on the Court's waiting lists for trial.

There is a more consistent trend in the numbers of finalised matters that were mediated than the overall number of finalisations. This suggests that the number of matters in which mediation occurred has not been determined by the number of matters that were ripe for finalisation. Nor has the number of matters mediated determined the overall number of finalisations. Chart [3.4D] indicates that court-connected mediation is not responsible for the fluctuations in the number of matters finalised over time. Referral to mediation has occurred in a relatively steady proportion of finalisations since the mediation programme was formalised.

Categories of case codes can be isolated to explore referral practices further. For example, Chart [3.4E] illustrates the referral practices in relation to torts actions.¹⁴⁰

¹³⁹ On 30th March 1998 the *Magistrates Court (Civil Division) Act 1992* (Tas) commenced. Prior to that date, the jurisdiction of the Court of Requests was limited to \$5000 [*Local Courts Act 1896* (Tas)].

¹⁴⁰ Tortious actions were identified as those with case codes 301-306, 308, 309, 317-323, 401, 501, 719 and 728. See Appendix D for the list of Case Codes provided by the Court.

Chart 3.4E¹⁴¹

Source: Court database

Both the number of torts finalisations and the proportion that were mediated grew from 1996/7 to 2001/2. The impact of section 138AB(2) of the *Workers Compensation and Rehabilitation Act* introduced in 2001 and the *Civil Liability Act 2001* (Tas) on the number of torts finalisations is clearly demonstrated by the sharp fall in the number of finalisations from 2003. The number of torts finalised matters that were mediated also fell during that period.

¹⁴¹ The 2002/2003 financial year has been omitted because the mediation statistics are unreliable for that year. For further discussion see n86 above. Ns are as follows:

| | Hobart torts finalised | Hobart finalised torts mediated |
|---------|------------------------|---------------------------------|
| 1996/97 | 507 | 54 |
| 1997/98 | 500 | 60 |
| 1998/99 | 531 | 106 |
| 1999/00 | 555 | 118 |
| 2000/01 | 503 | 114 |
| 2001/02 | 591 | 144 |
| 2003/04 | 510 | 184 |
| 2004/05 | 405 | 132 |
| 2005/06 | 285 | 82 |

The decline in the percentage of torts finalisations that were referred to mediation between 2003 and 2006 can be explained by the reduced backlog of torts cases awaiting finalisation. Furthermore, the likelihood that a matter would be referred to mediation at the close of pleadings, together with the expense of mediation, may have increased the likelihood of serious settlement negotiations prior to mediation. This trend may also indicate that following an initial enthusiasm for mediation, legal practitioners and disputants have become more discerning in their referral decisions. Data about settlement and manner of finalisation are analysed in [6.1] below.

Together, Charts [3.4E] and [3.4D] demonstrate that after 2003 a higher percentage of tortious actions were referred to mediation than other types of actions. After the formalisation-settling in period, a higher percentage of torts cases were finalised at or after mediation, rising from an average of 23% in the years of formalisation-settling in to 33% in the years after formalisation.¹⁴² This compares to the overall percentage of 18% in the years of formalisation-settling in and 21% in the three year period after formalisation.¹⁴³ Torts matters are therefore more likely than other matters to be referred to mediation at some stage prior to finalisation. This is consistent with the fact that most mediations at the Court are torts matters.¹⁴⁴

3.5 Format

As stated above, there are no legislative or policy guidelines about the appropriate format of court-connected mediation at the Court.¹⁴⁵ Assuming that the mediators control the process of mediation, the format is at the mediator's discretion. It is,

¹⁴² See [Table 3.4C] above.

¹⁴³ See [Table 3.4C] above.

¹⁴⁴ See [Chart 3.3A] above.

¹⁴⁵ See [3.1] above.

however, likely that other participants, particularly lawyers, also influence the format of mediation.

3.5.1 Two distinct formats

There appear to be two kinds of mediation conducted at the Court. The first group of matters comprise the majority of mediations that are conducted and include motor vehicle and workplace personal injuries matters, professional negligence matters where the professionals are not present at the mediation and commercial debt collection matters. The typical format of mediation in this first group of matters, described by the mediators and lawyers in interviews and confirmed by observations of mediation, is as follows:

- The mediator welcomes participants and offers them a cup of tea or coffee.
- The mediator makes an introductory statement about the mediation process, the role of the mediator and the confidential nature of the mediation.
- The plaintiff's case is presented, invariably managed by the lawyer and usually by the lawyer speaking on the plaintiff's behalf.¹⁴⁶
- The defendant's case is presented, invariably managed by the lawyer and usually by the lawyer speaking on the defendant's behalf.¹⁴⁷
- The mediator summarises the issues to try to define them. This is usually a quick summary.
- The mediator holds a private session with each disputant and their legal advisor. The focus of the private session is usually on the strengths and weaknesses of the two sides of the legal argument and the amount that the

¹⁴⁶ See Chapter 5 [4] for further discussion of the tendency for lawyers to make opening statements on the behalf of the disputants.

¹⁴⁷ See Chapter 5 [4].

disputant is prepared to propose for settlement. Some mediators provide an opportunity for the disputants to speak in the private session and to ventilate personal and non-legal issues, particularly those which may be blocking their ability to reach agreement.

- The parties commence making offers and counter-offers. Sometimes this occurs with all participants present in the same room. Usually the offers will be supported by an explanation about why it is an appropriate settlement amount. At other times the mediator may relay the settlement offers on behalf of the parties.
- If an agreed figure is reached then the terms of settlement will typically be formalised in a consent judgment which will be signed by the legal practitioners and the Registrar. At other times, particularly where privacy is important to one or both disputants, settlement may be by way of a Deed of Release.

The second group of matters is made up of all other mediated matters, including relationship, estate, commercial and professional negligence matters where the professional participates in the mediation process.¹⁴⁸ In those types of matters the mediators usually make an assessment about the nature of the dispute and determine whether the mediation ought to be client focused or whether the parties consider that the dispute is just about money. If it is just about money, it will be conducted in accordance with the format of the first group above. Otherwise, there is likely to be a higher degree of direct disputant participation and more attention is paid to the non-

¹⁴⁸ This second kind of mediation has been described by two of the mediators. The distinction between the two formats has not been identified from either lawyer interviews or the observations. The mediators' reports of what they do are relied upon in isolation from other evidence.

legal issues. The mediator will provide an opportunity for the disputants to express the way the dispute has impacted upon them. These types of mediations often take longer than the first type. The mediators are likely to move between mediation models to assist the parties to work towards a suitable agreement.

The distinction between these two kinds of mediation, as reported by two mediators, reveals an assumption that matters falling into the first group, including personal injuries matters, are always about money. The way that these ‘standard’ mediations are conducted reflects the priority of the legal issues and of seeking a settlement based upon the law. Each side presents its case in a summary form of the arguments that would be presented to a judge. Parties to this group of matters, if practised as described, do not experience a process that responds to their non-legal interests, provides them with a full opportunity to participate in the resolution of the dispute, or encourages a cooperative problem-solving venture. For many disputants, this may be completely acceptable. This study does not involve disputant feedback. However, other studies have demonstrated that many personal injury plaintiffs would value a process that provided them with a real opportunity to explore a range of issues (See Chapter 2). For example, Relis found that mediation for plaintiffs predominantly meant communication between disputants and treating their psychological needs.¹⁴⁹

The second group of matters described in the Court also demonstrates that a desire by disputants to explore a range of interests and to participate actively in the mediation process appears to be treated as the exception rather than the rule. The appropriateness of broad problem definition and direct disputant participation is

¹⁴⁹ Relis (2009), above n79, 109.

recognised, but perceived to be limited to particular kinds of matters. The inquiry about whether or not a broad approach should be taken does not appear to be made in personal injuries matters, which are assumed to be only about money. This is contradictory to Relis' findings that both plaintiffs and defendant physicians usually prioritised the opportunity to have personal interaction over monetary issues.¹⁵⁰

3.5.2 General features

Mediations are generally allocated two hours, although if necessary the time will be extended, depending on the availability of the participants. Mediations may be adjourned and reconvened. The average time taken in many court-connected mediation programmes is between two and three hours.¹⁵¹

In the Court, seating arrangements are left to the discretion of the legal practitioners. Usually the legal practitioners will sit either side of the mediator with their clients on the outside. This seating arrangement emphasises the lawyers' dominant role and places the disputants on the periphery. Occasionally lawyers might place the client next to the mediator. This seating arrangement tends to facilitate direct disputant participation and place the disputants at the centre of the dispute, which is appropriate provided that the disputants are equipped psychologically and emotionally to participate directly in the process.¹⁵² This seating arrangement may

¹⁵⁰ Relis (2009), above n79, 109.

¹⁵¹ See for example: Sourdin (2009), above n5; Chinkin and Dewdney (1992), above n79; Genn et al (2007), above n88; Schildt et al (1994), above n88; Hann and Baar et al (2001), above n126, although time often exceeds 3 hours; Relis (2009), above n79; Wissler (2001-2002), above n78; Clarke et al (1995), above n88.

¹⁵² Laurence Boulle, *Mediation: Skills and Techniques* (2001), [10.53]. 'It is preferable for the mediators to make the strategic decisions about seating. It is clearly more in the spirit of the mediation process and client self-determination for Dr Blood and the other party to be seated in the places of precedence near the mediator, with the professionals seated further away in their 'supportive' role; Moore (2003), above n84, 156; Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (2nd ed, 2004), 283.

also minimise lawyer dominance of the process. The practice observed in the Court reinforces lawyer dominance and minimises the disputant's role.

3.5.3 Pre-mediation contact

At the Court, mediators do not usually disclose prior contact with the participants or invite the participants to commit to the process in their opening statements.

Disclosure of prior contact is omitted from the opening statement because the mediators at the Court do not usually conduct any pre-mediation meetings with the disputants or their lawyers.¹⁵³ In mediation programmes where preliminary conferences are conducted, the purposes of such conferences may include the screening of the suitability of disputes for mediation, education of lawyers and disputants about the nature of the mediation process, verification that the participants will have authority to settle, organisational arrangements in relation to venue and settling of an agreement to mediate.¹⁵⁴ There are a number of factors that diminish the importance of these functions in the Court's mediation programme, including the compulsory nature of the programme, the legalistic rather than interest-based nature of mediation practice, the legislative requirement that participants have authority to settle, the pre-determined venue and the absence of written agreement to mediate.¹⁵⁵ Typically, the mediator will indicate that she or he has read the papers provided by the lawyers, which contain the pleadings and relevant expert reports.

¹⁵³ There have been some changes in practice since 2006 and mediators are now more likely to conduct a pre-mediation session with lawyers, particularly in building cases, relationship and estate matters. These sessions involve fact finding as to the legal issues, who should attend the mediation and whether or not the aim of the mediation is to try to achieve settlement or to narrow the issues. [Interview with Elizabeth Knight, Registrar, Ian Ritchard, past Registrar and Merrin Mackay, legal officer (Supreme Court of Tasmania, 14th February 2008)].

¹⁵⁴ Boule (2001), above n152, [2.20].

¹⁵⁵ The consent memorandum used when requesting that a matter be mediated is the only document signed by the parties prior to attending mediation.

There is a practice of conducting pre-mediation meetings in some other Australian Supreme Court jurisdictions. Preliminary meetings were held in the New South Wales Settlement Week 1992 to explain the process, define the issues, set the agenda and for parties to sign the mediation agreement.¹⁵⁶ Ten years later, the settlement programme in the same jurisdiction was evaluated by Sourdin and Matruglio, who reported that 87% of mediators had held a pre-mediation and 55% of those were held face to face.¹⁵⁷ Sourdin's 2009 study of mediation in the County and Supreme Courts of Victoria found that only four out of twenty mediators held preliminary conferences in that jurisdiction.¹⁵⁸ She drew a link between the low frequency of pre-mediation meetings and low rates of direct disputant participation.¹⁵⁹ If that conclusion is applied to the Supreme Court of Tasmania's mediation programme, then the absence of a pre-mediation process may contribute to the low rates of direct disputant participation (see below).

3.5.4 No express commitment to the mediation process

At the Court, participants are not asked to commit to the mediation process. Such an express commitment might secure agreement to the rules of the process, to which reference could be made if one of the participants breaches those rules.¹⁶⁰ Although court-connected mediation occurs in a climate where there is some compulsion to mediate, there is no compulsion to commit to the process. The presence of disputants at mediation is required, not necessarily their genuine attempt to explore the possibility of resolving their dispute. The absence of either a legislative requirement that participants approach the mediation process in 'good faith' or of guidelines as to

¹⁵⁶ Chinkin and Dewdney (1992), above n79.

¹⁵⁷ Sourdin and Matruglio (2002), above n5.

¹⁵⁸ Sourdin (2009), above n5.

¹⁵⁹ Sourdin (2009), above n5.

¹⁶⁰ Boulle (2001), above n152, 184.

appropriate approaches to mediation, reinforces that an express commitment to the mediation process is not a high priority. By contrast, it is asserted in some mediation literature that the commitment of the disputants to the mediation process is essential and the mediator ought to secure confirmation of that commitment in the early stages of the mediation process.¹⁶¹ The absence of a practice of seeking verbal commitment is particularly problematic given that the participants in mediation at the Court do not enter into a written Agreement to Mediate. The potential difficulties arising include disingenuous approaches to the process, difficulty building trust between participants and lack of boundaries of behaviour to be tolerated within the process. The experiences of lawyers in the mediation programme are discussed in Chapter 5 and include some reports of these difficulties.

3.5.5 Opening statements are usually made by lawyers

It is rarely the disputants themselves who present their arguments in mediation at the Court. This is particularly the case in the first group of matters described above. The task of presenting arguments is enthusiastically embraced by the legal practitioners.¹⁶² The practice in the Supreme Court of Tasmania is consistent with other Australian court-connected programmes. In the County and Supreme Court of Victoria opening statements are made by lawyers, lawyers with clients but never clients alone.¹⁶³ In the New South Wales District and Supreme Courts, half of opening statements were made by lawyers alone, one third by lawyers and parties and the remainder by parties alone.¹⁶⁴

¹⁶¹ Moore (2003), above n84, 95-97.

¹⁶² See further discussion in Chapter 5 [4].

¹⁶³ Sourdin (2009), above n5.

¹⁶⁴ Sourdin and Matruglio (2002), above n5.

It has been suggested that if legal practitioners are allowed to make opening statements on behalf of the disputants as a general rule, as opposed to only in appropriate circumstances:

...the mediator is setting the scene for a hijack and is elevating the lawyers' role above that of the parties. The mediator may, in fact, be disempowering the parties and at the same time losing sight of their own role or indeed their obligation to control the process.¹⁶⁵

Such concerns reflect the core mediation feature of self-determination and the significance of direct disputant participation on its realisation. Direct disputant participation is discussed further in Chapter 5.

3.5.6 Focus on areas of disagreement

At the Court, areas of disagreement ('the issues') tended to be the focus rather than areas of agreement. The tendency in court-connected mediation practice is for areas of agreement to be set aside, ignored or dismissed rather than emphasised and expressly focused on.¹⁶⁶ Some lawyers are impatient to get down to the 'real issues' by which they mean the contentious issues and the strengths and weaknesses of the legal arguments in relation to those issues. By comparison, the theoretical benefit of identification of common ground is the building of hope of reaching consensus through the mediation process.¹⁶⁷ Attention to areas of agreement may build a cooperative problem-solving mindset. The lack of attention may impact on the cooperative opportunity presented in the Court's programme.

¹⁶⁵ Charlton & Dewdney (2004), above n152, 279.

¹⁶⁶ Boulle (2005), above n115, 186; Sourdin (2009), above n5.

¹⁶⁷ Boulle (2001), above n152, [5.34].

The trend of ignoring common ground is not universal. Whether or not there is a focus on areas of agreement largely depends upon the approach of the legal practitioners. One legal practitioner explicitly referred to the areas of agreement when addressing the question of preparation for mediation:

I prepare myself by reading the brief and trying to identify the areas of agreement - I call them the islands of agreement in my mind and I have a positive view that the best way to start a mediation is to identify the areas that the parties are agreed upon so that you can at any point where it all gets too rough in areas of disagreement retreat back to the islands of agreement and to branch out in a different direction to see if you can find areas to expand the island. That's a very visual analogy but that is generally how I see it. So what I'm trying to do is to find areas where I think we can merge agreements so that in fact you can condense what are the disagreements down to one or two issues¹⁶⁸

Most other interviewees, including all four mediators, spoke in terms of the 'issues' at mediation, meaning the areas of disagreement.

4 Participants in court-connected mediation

4.1 Mediators

4.1.1 In-house and external mediators

During the years relevant to this study,¹⁶⁹ three Court employees conducted the majority of mediation conferences at the Court: the then Registrar,¹⁷⁰ the Deputy Registrar and a legal officer. Usually only one mediator attended each mediation. The legal officer conducted more than half of the mediations and her primary role at the Court was to conduct mediations. There were a small number of mediators (one or two at any one time) who performed the remaining mediations, sometimes

¹⁶⁸ Lawyer 38.

¹⁶⁹ 1996 to 2006.

¹⁷⁰ The Registrar referred to in the statistics in this thesis retired in June 2007.

because they were requested by the parties and sometimes because the demand for mediation exceeded the capacities of the Court employees. External mediators were originally brought into the programme for the purpose of increasing the number of mediations that could be conducted. Particularly in the latter half of the calendar year, it was found that demand outstripped the availability of the court employed mediators.¹⁷¹

There is a mixed practice of using ‘in house’ or ‘external’ mediators in other jurisdictions. Court-employees are used occasionally in the Supreme and County Courts of Victoria and exclusively in the Local Court of Western Australia and Metropolis County Superior Court (where judges conduct the mediation process).¹⁷² Courts in Ohio employed part time mediators for their pilot mediation programmes, but settlement week mediators were external volunteers.¹⁷³ In the Supreme Court of Victoria private mediators are mainly used, as is the case in the Supreme Court of New South Wales, the Magistrates Court of Victoria, Central London County Court and North Carolina Courts.¹⁷⁴

¹⁷¹ Ian Ritchard, ‘Circular No 4: Mediation Services, Supreme Court’ (Supreme Court of Tasmania Circular, 7 November 2002) ‘Merrin Mackay and I are unable to give any further appointments for mediations this year’; Ian Ritchard, ‘Circular No 8: Mediation’ (Supreme Court of Tasmania Circular, 25 September 2003) ‘Because of the demand for mediation conferences there is a delay in allocating appointment dates.’ <www.courts.tas.gov.au/supreme/publications/circ_03_8.htm> at 2 June 2004. These circulars are no longer located on the Court’s website.

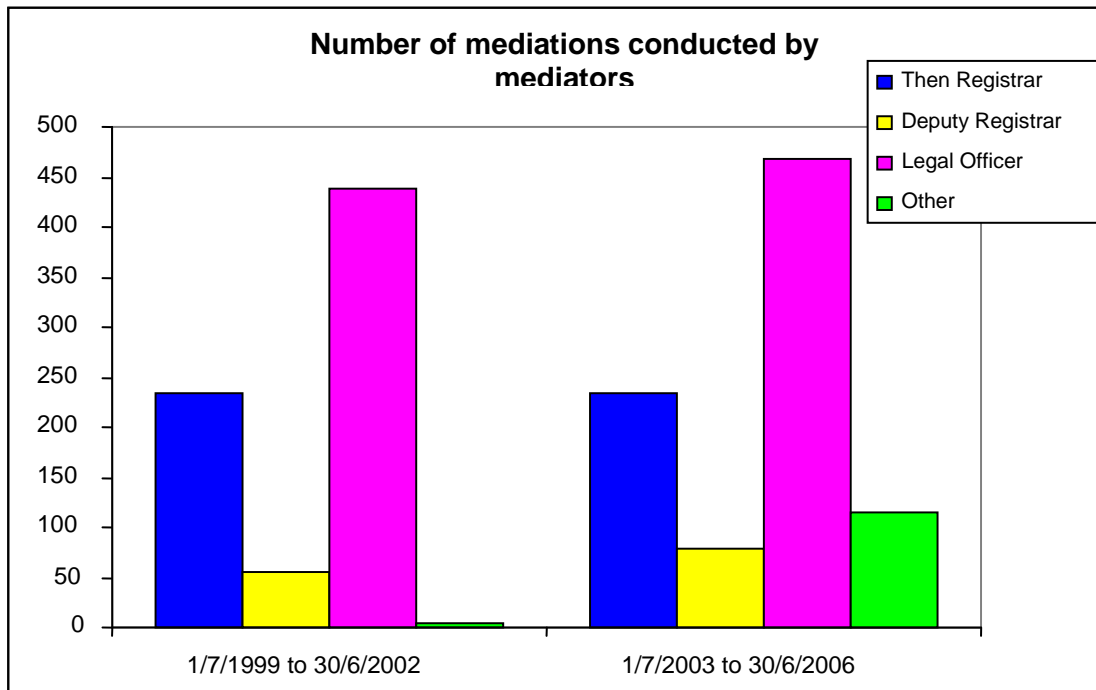
¹⁷² Sourdin (2009), above n5; Howieson (2002), above n78; Burns (2000), above n78.

¹⁷³ Wissler (2001-2002), above n78.

¹⁷⁴ Chinkin and Dewdney (1992), above n79; Carol Bartlett, ‘Mediation in the Spring Offensive’ (1993) *Law Institute Journal* 232; Melissa Conley Tyler and Jackie Bornstein, ‘Court referral to ADR: Lessons from an intervention order mediation pilot’ (2006) 16 *Journal of Judicial Administration* 48; Genn et al (2007), above n88; Clarke et al (1995), above n88.

The number of mediations conducted by each of the three court employees and other mediators in the period of formalisation-settling in and the period after formalisation¹⁷⁵ are represented in the following chart:

Chart 4.1¹⁷⁶



Source: Court database

The use of court employees provides a benefit to disputants in that there is reduced cost when compared to retaining mediators at market rates.¹⁷⁷ However, it means that a small number of mediators are available to conduct mediations. This may contribute to delay in obtaining a mediation date and also restricts the range of expertise that is available.

Relying primarily on mediators who are court employees provides a number of potential advantages for the Court. They include the ready availability of the

¹⁷⁵ The three year periods analysed in this Chapter are defined in [3.4.3] above and Chapter 3 [3].

¹⁷⁶ 1999-2002 N=732, 2003-2006 N=896.

¹⁷⁷ See [6.3.2] below.

mediators at short notice and the Court's control and responsibility for the training of the mediators.¹⁷⁸

4.1.2 Quality control

Responsibility for training should give the Court better control over the quality of the service provided. However, apart from settlement rates, the Court does not systematically gather evidence of mediation quality within its programme. This can be contrasted to the Magistrates Court of Victoria, which issues client satisfaction surveys and provides pre-training specific to its mediation programme.¹⁷⁹ Sourdin recently recommended that the County and Supreme Courts of Victoria improve their quality control over mediators who, in those jurisdictions, are external.¹⁸⁰ It would be easier for the Court in Tasmania to monitor and measure the quality of mediation because it occurs 'in house'. However, this has not occurred in any formal sense to date.

The private nature of mediation and the legislative barriers to communication about what has occurred within mediation present further obstacles to quality control and accountability. Courts have expressed reluctance to penetrate the confidentiality of mediation in order to monitor mediator, lawyer or party behaviour within the process.¹⁸¹ The Supreme Court of Tasmania has not taken formal steps to monitor the performance of mediators, nor to prescribe standards for the conduct of mediation

¹⁷⁸ Jamie Wood, 'Federal Court-annexed Mediation Seventeen Years On' (2004) 14 *Journal of Judicial Administration* 89 at 95.

¹⁷⁹ Conley Tyler and Bornstein (2006), above n174.

¹⁸⁰ Sourdin (2009), above n5, Recommendation 3.

¹⁸¹ See for example: *Tapoohi v Lewenberg [No2]* [2003] VSC 410 (Unreported, Habersberger j, 21st October 2003).

within the programme.¹⁸² Informal and irregular monitoring by the previous and current Registrars has been undertaken. Time and resource pressures have contributed to the absence of formal monitoring procedures.

4.1.3 Mediator's training and experience

All of the mediators have undertaken some form of formal mediation training comprising one-off short courses. The most recent formal training for one mediator was a two day advanced mediation course seven years prior to the interview. The other mediators had not undertaken formal training in the ten years prior to the interview. Two mediators had completed one formal mediation short course whilst the other two had completed a number of courses. Formal mediator training, evaluation of performance and feedback have been infrequent in the Supreme Court of Tasmania. The mediators have attended a number of conferences and seminars in relation to mediation and occasionally debrief with one another after mediation. Two had also undertaken some co-mediations in non court-connected contexts for the purpose of professional development. However, there are no formal professional development or continuing education structures connected to or within the Court itself. The mediators' professional development appears to be self-directed and somewhat ad hoc.

The mediators who are Court employees have some limited experience of mediating outside of court-connected mediation. Two of the mediators have been engaged to conduct conciliations and mediations at the Magistrates Court of Tasmania. Two have co-mediated a limited number of family disputes from time to time with

¹⁸² The judges have the power to set guidelines for the conduct of mediations in *Supreme Court Rules 2000* (Tas) r519(3).

Relationships Australia. The mediation practice of the external mediator who was interviewed is conducted primarily outside the Supreme Court's programme.

Another of the external mediators who conducted a small number of mediations at the Court also maintained a private mediation practice.¹⁸³

All of the mediators have legal training. The then Registrar is legally qualified and worked in the area of court administration throughout his career. The other mediators have legal qualifications and varying degrees of experience in legal practice. The three non-employees who have conducted mediations at the Court were in legal practice for some years. None of the mediators has been a Senior or Queen's Counsel and none has been a judge, although the external mediator who was interviewed was a senior legal practitioner with many years experience.

There is a general preference in court-connected mediation programmes for mediators with legal expertise. Courts tend to appoint mediators with a legal background. For example, the Supreme Court of New South Wales in its 1992 settlement week programme appointed legal practitioners with at least five years legal experience including one former judge.¹⁸⁴ The Ohio, North Carolina and Illinois Courts appointed attorneys with substantial experience in law and some former magistrates or judges.¹⁸⁵ When parties have the freedom to choose their own mediator, there is a general preference for mediators with a legal background. For example, private mediators engaged in the County and Supreme Courts of Victoria are usually lawyers and mediators working at the ADR Chambers in Toronto were all

¹⁸³ This mediator no longer mediates within the Court's programme and was not interviewed for the purposes of this research.

¹⁸⁴ Chinkin and Dewdney (1992), above n79.

¹⁸⁵ Wissler (2001-2002), above n78; Clarke et al (1995), above n88; Schildt et al (1994), above n88.

senior counsel and retired judges.¹⁸⁶ The Toronto court-connected mandatory mediation programme is somewhat of an exception, because 35% of the mediators appointed by the Court are non-lawyers.¹⁸⁷ Most of the mediators engaged in the Saskatchewan Queen's Bench programme are non-lawyers, which is unusual for a court-connected mediation programme.¹⁸⁸ Consequently, in that jurisdiction mediators are not expected to evaluate the merits of the legal claims.

4.1.4 Choice of mediator

In the Court's mediation programme, disputants can request that a particular mediator conduct their mediation, which will occur subject to the mediator's availability. In the absence of a request at the time of booking, the Court allocates a mediator. There are mixed policies between courts as to whether or not parties have a choice of mediator. For example, parties also have the discretion to choose a mediator from a list compiled by the courts in the Judicial Circuit of Illinois, The Ontario Mandatory Mediation Programme and North Carolina Courts.¹⁸⁹ Parties may choose any private mediator in the Supreme and County Courts of Victoria.¹⁹⁰ In other programmes there is no choice for parties as to who will mediate their dispute. See for example settlement week in New South Wales 1992, the Central London County Court, Metropolis County Superior Court in the United States and the Saskatchewan Queen's Bench in Canada.¹⁹¹

¹⁸⁶ Sourdin (2009), above n5; Relis (2009), above n79.

¹⁸⁷ Relis (2009), above n79.

¹⁸⁸ Macfarlane and Keet (2005), above n127.

¹⁸⁹ Schildt, Alfini and Johnson (1994), above n88; Hann and Baar et al (2001), above n126 (Note parties are not restricted to the Courts' list in this jurisdiction); Clarke, Ellen and McCormick (1995), above n88.

¹⁹⁰ Sourdin (2009), above n5.

¹⁹¹ Chinkin and Dewdney (1992), above n79; Genn et al (2007), above n88; Burns (2000), above n78; Macfarlane and Keet (2005), above n127.

4.1.5 Significance of mediators' characteristics

There are a number of consequences that arise from the background and training of the mediators at the Supreme Court of Tasmania. Legal perspectives of dispute resolution remain the primary background of mediators who have substantial legal training and experience within the legal system. The scarcity of formal professional development opportunities means that some mediator habits may continue unchecked. The absence of formal quality control procedures, combined with the absence of guidelines or policy statements regarding the conduct of mediation within the Court, demonstrates that the practice of mediation within the Court is left to the discretion of each mediator. Judgments about the quality of the mediators' practice cannot easily be made because there is inadequate guidance about what mediators ought to be doing within the programme.

4.2 Disputants

There are two main groups of disputants who participate in court-connected mediation: individual litigants and representatives of organisations such as insurance companies.

4.2.1 Individuals

Data was not collected about the proportion of participants who were individuals at the Court.¹⁹² However, as a guide, half of the disputants in the Ohio Court's mediation programme (which had a similar case mix) were individuals.¹⁹³ Individual litigants may be first time participants in litigation who are unfamiliar with the legal

¹⁹² The identity of litigants was not provided in the Court's database for confidentiality reasons, according to the requirements of the Ethics Committee. See discussion in Chapter 3.

¹⁹³ Wissler (2001-2002), above n78.

process. Often the only occasion on which individual litigants physically attend the Court premises is to participate in a court-connected mediation.¹⁹⁴ There is some evidence that parties with less prior experience of mediation may feel more pressured to settle by the mediator.¹⁹⁵

Individual litigants have often been personally involved in the occurrence that has given rise to the dispute. They may be dealing with personal or business consequences of either the dispute or the litigation including emotional distress, loss of business reputation or financial difficulty. There is some evidence that individual disputants, both plaintiffs and individual defendants, would value an opportunity to address these needs in the mediation process.¹⁹⁶ In court-connected contexts this is often frustrated by the attendance of institutional defendants rather than the actual individuals involved. For example, Relis found that all of the doctors she interviewed thought that their personal attendance at mediation was essential so that they could communicate directly with the plaintiff patient.¹⁹⁷ However, defendant physicians rarely attended, because their lawyers discouraged it on the grounds that the dispute was only about money and doctors couldn't instruct about money, that their presence would provide free discovery and raise emotions and finally, because lawyers were not comfortable with the idea of doctors attending mediation.¹⁹⁸

¹⁹⁴ Under the *Supreme Court Rules* 2000 (Tas) r519(4) disputants are required to attend mediation. See further discussion following. Few other pre-trial processes require the physical presence of disputants at the Court.

¹⁹⁵ Wissler (2001-2002), above n78.

¹⁹⁶ Relis (2009), above n79.

¹⁹⁷ Relis (2009), above n79, 106.

¹⁹⁸ Relis (2009), above n79, 106.

Most individual disputants are legally represented¹⁹⁹ and rely on their legal practitioner to guide them through the process, to decide what needs to be done and when, to advocate and negotiate on their behalf and to advise them about the status of their legal situation in relation to the dispute. These are the traditional tasks performed by lawyers.²⁰⁰ Notwithstanding the fact that they have secured legal representation, research suggests that individual disputants want an opportunity to participate directly in the process and would often like to participate more than they do.²⁰¹

4.2.2 Representatives

The second category of disputant participant in mediation is the insurer's representative or representative of another organisation. Participants who represent an insurer or other organisation have a professional interest in the dispute. They may have performance targets to reach and their ability in their job may be judged according to the monetary outcomes that they achieve through the mediation process. They are therefore likely to focus on money as opposed to the resolution of the plaintiff's non-monetary interests. Unless plaintiffs or their lawyers present their non-financial interests in mediation, it is unlikely that such interests will be considered by defendant insurers.

¹⁹⁹ See The Honourable Justice Pierre Slicer, 'Self-Represented Litigants' (Paper presented at the Magistrates' Conference, Hobart, Monday 14th June 2004). Details of parties and lawyers were not provided on the Court's database due to confidentiality requirements imposed by the ethics committee. See Chapter 3.

²⁰⁰ See further Craig A McEwen and Roselle L Wissler, 'Finding Out If It Is True: Comparing Mediation and Negotiation Through Research' (2002) *University of Missouri Journal of Dispute Resolution* 131; Craig A. McEwen, Nancy H. Rogers and Richard J. Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 *Minnesota Law Review* 1317, 1360-1361.

²⁰¹ Sourdin (2009), above n5 (75% considered that they were able to participate, 65% would have liked to participate more and only 35% considered that they had control during the process); Macfarlane and Keet (2005), above n127 (the opportunity to participate directly was reported upon favourably by individual disputants).

Insurance representatives seldom have a relationship with the plaintiff in either the past or the future. These participants, like the lawyers, are agents for the actual disputants. Court-connected mediation is often the first time that litigants have met one another, and institutional defendants can find it a valuable opportunity to understand the plaintiff's claim.²⁰² In the context of court-connected mediation, the parties to litigation are not necessarily the people who were directly involved in the events giving rise to the dispute. For example, in torts actions where insurers are parties to the litigation, they represent the disputant who was directly involved in the tortious event. The defendant driver of a motor vehicle, employer of a plaintiff worker or professional who provided the plaintiff with a service will rarely attend the court-connected mediation. If the facts of that event are disputed, the absence of the other disputant may limit the extent to which the plaintiff feels that their version of events has been heard. It may also present a barrier to the resolution of factual disputes relating to the tortious event. In that sense, mediation of insurance disputes provides limited scope for resolution of issues about the tortious wrong, contractual breach or the relationship between the people actually involved in the dispute.

Institutional representatives are likely to have attended many court-connected mediations, to be familiar with legal processes and to have met the lawyers and mediator on previous occasions, particularly in the relatively small Tasmanian legal community. Together with lawyers and mediators, this second group of disputants are repeat players in the court-connected mediation process.²⁰³ Familiarity may contribute to the fact that institutional defendants are more likely to feel that the

²⁰² Macfarlane and Keet (2005), above n127.

²⁰³ Carrie Menkel-Meadow, 'Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR' (1999) 15 *Ohio State Journal on Dispute Resolution* 19.

process was fair than individual disputants,²⁰⁴ to consider that they had an opportunity to participate and that they had some control over the process.²⁰⁵

4.2.3 Attendance is required

The Rules provide that ‘Unless otherwise ordered or agreed by the parties, each party is to attend the mediation with authority to settle.’²⁰⁶ This requires that the litigants must usually attend the mediation. This is consistent with requirements in the Supreme Court of New South Wales settlement week schemes, Magistrates Court of Victoria, Ohio and North Carolina Courts.²⁰⁷ Personal attendance by disputants is not required in the Supreme and County Courts of Victoria or the Local Court of Western Australia and not enforced in the Toronto mandatory mediation programme.²⁰⁸

In 2003 a circular was issued by the then Registrar which referred to the requirements arising from rule 519(4).²⁰⁹ The circular noted that attendance by an insurer or other party could be either in person or by telephone conference.

Disputants who reside interstate may therefore choose to attend mediation by telephone conference if the cost of travelling to Tasmania is prohibitive. In such circumstances, the physically absent participant is placed on speaker phone in the middle of the round table in the mediation room. The disadvantages of participating in this way include the loss of opportunity to witness the body language and the

²⁰⁴ Wissler (2001-2002), above n78,

²⁰⁵ Sourdin (2009), above n5.

²⁰⁶ *Supreme Court Rules 2000* (Tas) r519(4).

²⁰⁷ Chinkin and Dewdney (1992), above n79; Bartlett (1993), above n174; Conley Tyler and Bornstein (2006), above n174; Wissler (2001-2002), above n78; Clarke et al (1995), above n88.

²⁰⁸ Sourdin (2009), above n5; Howieson (2002), above n78; Relis (2009), above n79.

²⁰⁹ Ian Ritchard, Circular No 8, above n171.

demeanour of other participants and some possible difficulty in understanding what is being said or done in the mediation room.²¹⁰

Rule 519(4)²¹¹ requires that the representative who attends mediation has sufficient authority within their organisation to settle the dispute on its behalf. Consequently, in matters involving large sums of money, company executives often attend the mediation. Even if it is agreed between the parties that a person with authority to settle will not attend, such a person must be contactable for the duration of the conference.

4.3 Legal Practitioners

4.3.1 Number of legal practitioners

Disputants are usually represented by a legal practitioner in mediation at the Court.²¹² Approximately 146 legal practitioners work in the area of Supreme Court civil litigation.²¹³ It is in the nature of the relatively small jurisdiction that the same legal practitioners, mediators and representatives of institutional defendants regularly meet and participate in mediation conferences.

One of the problems that arise from the relatively small number of practitioners who practise within the jurisdiction is the tendency for legal practitioners and mediators to become overly familiar with one another during mediation. During the interviews,

²¹⁰ Nadja M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation: Theory and Techniques*, Butterworths Skills Series (1st ed, 1998) [3.32].

²¹¹ *Supreme Court Rules 2000* (Tas) r519(4).

²¹² Most litigants are legally represented, see Slicer, above n199. It was confirmed during interviews and observations that this applies in court-connected mediation. It was not possible to obtain data about the proportion of mediating parties who were legally represented, because details of parties and lawyers were not included on the database provided for the purposes of the research. This was because of requirements from the ethics committee. See discussion in Chapter 3.

²¹³ Interview with Ian Ritchard, then Registrar (Supreme Court of Tasmania, Hobart, 4th July 2006).

two legal practitioners noted the familiarity that had become part of the court-connected mediation process.²¹⁴ They expressed concern about the impact this had on plaintiffs who were outside the familiar circle comprising the mediator, the legal practitioners and the insurer's representative:

We have a difficulty here, which we can't overcome, and that is that we're a small profession with a very small number of mediators. It comes back to a problem I mentioned earlier and that is I'm sure that plaintiffs get very quickly that they're the only strangers in the room. In other jurisdictions I think it's easier in a way because it's a bit more objective and a bit more arm's length. To some extent I guess that's our fault. It's very hard sometimes at court when you turn up for a mediation and you know the mediator very well, you know counsel on the other side very well. ... All the claims officers know the mediator very well ... Counsel acting for the poor old plaintiff knows the claims officer and the mediator and the counsel on the other side all very well. ... It would be good if we could somehow dilute that, so plaintiffs didn't come into the mediation feeling that they are intruding somehow almost. That's the impression I get, and you can see them looking around sometimes thinking 'there's a bit of a conspiracy here.'²¹⁵

I think there is a degree of familiarity that has crept into mediation now, which means that some mediators can be too friendly to some practitioners or the parties if they are constantly in front of them. I think it leads to potential or actual bias.²¹⁶

One of the mediators also recognised this issue:

You have to pull yourself up a bit, I mean I can get pretty slack about the process...Familiarity with the lawyers, you have to keep thinking 'well this client, this party hasn't been here before. But often you know the insurers and you get used to them coming...I think it has now become a bit too familiar.'²¹⁷

²¹⁴ Lawyers 14 and 39.

²¹⁵ Lawyer 14.

²¹⁶ Lawyer 39.

²¹⁷ Mediator 1.

These observations identify a problem that is difficult to overcome within a small jurisdiction, particularly in a relatively informal process. The consequence of over-familiarity between the professional participants in court-connected mediation is that the disputants are less likely to feel that they are an integral part of the process. They are more likely to feel like outsiders. This aspect of the mediation programme has the potential to take the focus away from the disputants themselves.

4.3.2 Negotiation or mediation training

Few Tasmanian legal practitioners have been formally trained in the skills of negotiation and processes of court-connected mediation. Interviewees were asked whether or not they had undertaken any formal training in mediation or negotiation. Only 14% indicated that they had done so.²¹⁸ The following comment by a legal practitioner emphasises the value that some members of the profession place on prior experience as opposed to formal training:

No, I have not had any “formal” training in mediation or negotiation.

I should point out however that I have not had any formal training as an advocate nor in most of the practical work involved in being a legal practitioner. What I have had is the advantage of working for the last forty years with some of the finest lawyers in Tasmania and elsewhere ... I have serious doubts about the practical efficacy of “formal” training in mediation or negotiation. The problem is lack of experience of the trainers in real forensic negotiation, however great their experience and qualifications are. How well these things can be taught are [sic] another question that is still to be answered.²¹⁹

²¹⁸ Of the 42 legal practitioners interviewed only six indicated that they had undertaken any formal negotiation or mediation training. Lawyers 1, 12, 15, 21, 23 and 26.

²¹⁹ Lawyer 18, personal communication.

On the other hand, one interviewee identified that increased lawyer training in mediation was desirable.²²⁰

Until relatively recently there was no training in negotiation or mediation available for law undergraduates in Tasmania. The University of Tasmania's undergraduate law degree contains no compulsory subject devoted specifically to dispute resolution. In recent years some dispute resolution content has been taught within some of the compulsory subjects in the degree.²²¹ Until 2007 the lawyer's role in dispute resolution was not covered in any of the compulsory subjects in the University of Tasmania undergraduate law degree.²²² In some years a short course in negotiation has been a part of the Graduate Certificate in Legal Practice programme, which is the main avenue to admission as a legal practitioner in Tasmania.²²³

There is some dispute resolution content in elective subjects that are offered during the law degree.²²⁴ The Family Law dispute resolution processes are covered in the Family Law course. In 2006 an elective subject called 'Dispute Resolution Law and Practice' was offered for the first time at the University of Tasmania. It was offered again as a Summer School elective in 2008. Students who choose to participate in

²²⁰ Lawyer 27.

²²¹ For example, since 2005, final year Civil Procedure students have been introduced to mediation in two lectures and one two hour mediation workshop. Dispute resolution was also introduced in the first year units in 1999 in a part of the Introduction to Law course titled 'Access and Equality.' Various dispute resolution options were compared to the adversarial system in terms of qualities of accessibility and the promotion of equality. Since 2002, four Introduction to Law lectures and one or two tutorials have been devoted to dispute resolution. The processes covered in these lectures include adversary and inquisitorial litigation systems, mediation, negotiation and arbitration. The course introduces students to these processes in a general sense.

²²² The focus of the three lectures and workshop in Civil Procedure since 2007 has been the lawyer's role in court-connected mediation. Students are required to write a letter to their client in relation to a mediation as part of their assessment. They also participate in a workshop roleplay of a court-connected mediation.

²²³ Some interviewees mentioned this component of the Legal Practice Course during interviews.

²²⁴ Some electives contain one or two classes in negotiation, mediation or arbitration.

national client interviewing and negotiation competitions are also offered an optional two hour training session in the relevant dispute resolution skills.

The increased coverage of dispute resolution content in the University of Tasmania undergraduate degree in the new millennium is a reflection of the relevance of dispute resolution to legal practice. However, this content was not offered in Tasmania to the population of lawyers relevant to this thesis, who mainly comprised practitioners who were admitted to legal practice prior to the new millennium and who undertook their legal education at the University of Tasmania.

Some legal practitioners have obtained formal training in negotiation and mediation skills independently and some who undertook their law degree interstate have undertaken mediation or negotiation training in their undergraduate studies. Two of the lawyers interviewed had undertaken negotiation and mediation courses in their interstate undergraduate law degrees.²²⁵ Another four legal practitioners had undertaken a mediation course post admission²²⁶ and two others mentioned having read widely in the areas of negotiation and mediation.²²⁷

4.3.3 Mediation and trial experience

Experience is valued

In the view of many legal practitioners, experience is an appropriate way for legal practitioners to obtain the skills that they need to participate effectively in mediation. The limited mediation training reported by the interviewees indicated that most have developed their negotiation and mediation skills ‘on the job.’ Interviewees were also

²²⁵ Lawyers 23 and 26.

²²⁶ Lawyers 1, 12, 15 and 21.

²²⁷ Lawyers 22 and 41.

asked ‘what skills or training do legal practitioners need to participate effectively in mediation?’ The two most commonly mentioned aspects of experience were observation and participation. Some examples of responses that emphasised the value of observation were:

I think it’s really good for newly admitted solicitors to go down with experienced solicitors just to go down and see what they’re like.²²⁸

Through the practice of going to mediation conferences, watching other practitioners do them when you’re a junior practitioner.²²⁹

They develop them on the job and not through any formal process. As a result I suppose of watching other people and seeing what they do and seeing what works and what doesn’t work. That happens in all facets of all occupations. You learn, I mean I often tell people if you want to be an advocate go and sit in court and watch people because you can learn as much from the people who are really bad as you can from people who are really good. You can learn what not to do. And that’s true I think of, you know you go to mediations and you see, it may be an opponent, it may be co-defendant’s solicitor and counsel and you see them acting in a particular way or making a particular argument and you think to yourself ‘yeah that works, that’s persuasive’ or ‘no that’s not, that just makes people antipathetic to what you’re trying to achieve.’²³⁰

The value of participation was emphasised in the following responses:

You need a lot of experience at negotiation and mediation to become any good at it. But it’s like anything else, it really is a nonsense to suggest that it’s an innate skill that people have.²³¹

To participate in half a dozen of them to see how they operate.²³²

²²⁸ Lawyer 23.

²²⁹ Lawyer 15.

²³⁰ Lawyer 35.

²³¹ Lawyer 14.

Through practice more than anything else. .. I don't recall ... any seminars specifically on mediation. For the most part it's probably something most people have learnt on the job. I don't think that the tactics of mediation are such that you need any particular skills to hone those.²³³

Experienced legal practitioners have an advantage over less experienced practitioners. This advantage comes from familiarity with the mediation process, the mediator's style, previous mediation outcomes, together with the skills, tactics and confidence that are developed through experience.

Trial experience

There may also be an advantage for more senior practitioners who have extensive trial experience and therefore both perceived authority and actual knowledge about the court's treatment of evidence and decision making process. Sixteen lawyers (38%) mentioned trial experience as being significant in the ability to participate effectively in mediation.²³⁴ All but four²³⁵ of these practitioners also identified other skills that lawyers need to participate effectively, including: flexibility,²³⁶ commonsense,²³⁷ an ability to know what kind of mediation would be best²³⁸ and to support clients to air their grievances.²³⁹ A range of negotiation skills were also identified by this group of lawyers, including: the ability to compromise,²⁴⁰ to

²³² Lawyer 6.

²³³ Lawyer 17.

²³⁴ Lawyers 1, 3, 4, 7, 14, 16, 18, 19, 20, 24, 25, 28, 29, 37, 41 and 42.

²³⁵ Lawyers 1, 7, 24, 29.

²³⁶ Lawyer 37.

²³⁷ Lawyer 37.

²³⁸ Lawyer 41.

²³⁹ Lawyer 37.

²⁴⁰ Lawyer 41.

identify common ground,²⁴¹ to acknowledge and address weaknesses,²⁴² to engage rather than alienate,²⁴³ hide emotions²⁴⁴ and perform sleights of hand.²⁴⁵ Therefore, trial experience was not generally considered to be the only skill that contributed to lawyer effectiveness in mediation, but was part of a suite of skills that could be applied.

Some comments that demonstrate the perceived benefits of trial experience are:

A legal practitioner to effectively participate in mediation needs to know what the end result will be, needs to know how evidence will be received, what arguments will succeed and what arguments will not succeed. The only way the advocate is going to obtain practical training is to do cases. ... And as I said by the time that I was thirty I had participated as lead counsel in a number of cases. And it built up skill sets. Now to know that that evidence would be accepted or rejected, and how the judge would view that evidence is most important to know what the parameters of the dispute are.²⁴⁶

I think that to successfully conduct mediations and negotiated settlements outside mediation, you do need considerable experience of trial work, of what happens in court, because without that it's difficult to understand why you're mediating in a sense. It's hard to advise a client in the course of negotiations, in the course of a mediation conference, what much of what is being said to them means, from the other side. In blunt or simple terms, the sort of warnings that are often put to your client by the other side about what's going to happen if a trial occurs. Unless you've some experience of that it's difficult to be able to tell your client 'well that's a load of rubbish' or 'yes, there's some substance in that and this is why.' You certainly need the ability to assess the credibility of what's being put to you by way of negotiation and mediation. And having experience with witnesses is important in that respect.

²⁴¹ Lawyer 41.

²⁴² Lawyer 19.

²⁴³ Lawyer 42.

²⁴⁴ Lawyer 3.

²⁴⁵ Lawyer 41.

²⁴⁶ Lawyer 24.

Being able to read people's body language, being able to read between the lines of what's being said to you is important. I guess there's a thread of experience going through what I'm saying, in other words, some experience of litigation generally is important, without it, it's hard. Certainly experience of damages levels, the way the courts assess damages if it comes to that. If you don't have that knowledge and understanding then it's almost impossible to negotiate properly, because that's what you're negotiating your way out of, a trial. But on the basis of 'if we can't settle here that's where we're going to end up.'²⁴⁷

The benefits of trial experience reported by practitioners fell into two broad categories. First, trial experience was considered to provide realistic knowledge of the court process and outcomes if a matter doesn't resolve at mediation. This enables lawyers to provide accurate assessments to the client,²⁴⁸ builds confidence to challenge the other side²⁴⁹ or to assert to them what will happen in court.²⁵⁰ Secondly, trial experience was thought to be important because advocacy skills can be applied in mediation. Those skills include the structuring and presentation of submissions, equated with the opening statement in mediation and mastery of facts and law.²⁵¹ One practitioner mentioned a range of skills within the lawyer-client relationship as the hallmarks of a good advocate, namely: listening, empathy, communication, reality testing, commitment, identification of weaknesses and objectivity in advice.²⁵²

Most of the comments about the relevance of trial experience emphasise the view amongst lawyers that the aim of mediation is to settle the legal issues between the

²⁴⁷ Lawyer 14.

²⁴⁸ Lawyers 3, 14, 20, 28, 41, 42.

²⁴⁹ Lawyers 14 and 19.

²⁵⁰ Lawyer 37.

²⁵¹ Lawyers 4, 7, 18, 28, 37 and 41.

²⁵² Lawyer 1.

parties, with reference to the primarily adversarial trial process. It reflects a view of mediation as a tool of the court system and not mediation as an alternative. This view contributes to the almost exclusive focus on legal issues that is predicted in the hypotheses.

The benefits of trial experience in mediation are tempered by the fact that all legal practitioners have been educated in the substantive law and the rules of evidence and have access to judicial decisions. Interestingly, of the practitioners who did not mention trial experience, many mentioned the skill of case analysis (identifying strengths and weaknesses and knowing the law) as one that lawyers need to participate effectively in mediation.²⁵³ On the one hand, trial experiences may not be required to develop the skills of general legal practice. On the other hand, mediation experience may provide skills and knowledge that cannot be obtained from general legal practice.

Mediation experience

The private and consensual nature of mediation means that the outcomes and decision making processes adopted in mediation are not publicly available and therefore prior experience in mediation alone provides access to ‘mediation precedent’ in terms of contemporary settlement values for particular damages. This gives legal practitioners with substantial experience in mediation an advantage over those with less mediation experience. This observation also applies to practitioners with a mixed practice as opposed to those who specialise in civil litigation and therefore appear regularly in mediation at the Court. However, the different degrees

²⁵³ Lawyers 5, 9, 11, 13, 15, 22, 27, 30, 38 and 39.

of mediation experience ought not be overstated. Of the thirty nine legal practitioners who were asked to estimate the number of mediations that they had participated in over the past twelve months, thirty-four indicated that they had participated in between one and ten mediations.²⁵⁴ The other five practitioners had participated in between eleven and twenty. Therefore, there does not appear to be a significantly uneven spread of mediation experience from year to year within the profession. The imbalance comes from the years of general legal practice rather than more frequent exposure to mediation.

Opportunities to gain experience

Imbalance in prior mediation or trial experience leads to some less experienced practitioners briefing counsel to appear at mediation.²⁵⁵ The opportunity for junior practitioners to obtain the relevant experience that they need to participate confidently in court-connected mediation is therefore limited by the perception of advantage in engaging senior practitioners in the mediation setting. Several lawyers and mediators expressed concern about the limited opportunities being extended to more junior members of the profession to gain advocacy experience. For example:

I have a concern ... I think with the development in the last ten, particularly the last five years of an independent bar I think we've got some serious difficulties in training advocates. ...

The rise in the independent bar means that the advocacy work tends now to be concentrated and because it's a sort of a transitional process there is not a proper age profile at the bar. The bar is really top heavy. It's full of senior people and not many junior people. So it means that the advocacy work is being done by people who are already more or less experienced advocates and none now, well at the Supreme Court at any rate, is being done by more junior people. Sometimes they will come in as a junior or sit in as an instructing solicitor and that's

²⁵⁴ Further breakdown of this figure is not possible as the responses were categorised as '1 to 10', '11 to 20' and so on. See the interview schedules in Appendix B.

²⁵⁵ This trend was reported by interviewees from the independent bar, who mentioned an increased number of cases in which they were engaged to represent disputants in court-connected mediation.

some experience, but the flow on effect of mediation means that the number of trials and the opportunity to do that are correspondingly less. And I am genuinely fearful that in ten years time there's going to be a real shortage of experienced advocates. Now maybe that's unfounded I don't know, but I just don't see people being trained up in the way that it used to happen for all sorts of reasons and I think that mediation is part of that.²⁵⁶

This concern demonstrates a problem for mediation if it is accepted that to participate effectively in mediation a legal practitioner ought to have trial experience. That will depend upon the role that the legal practitioner is expected to perform during mediation and from which perspective the mediation process is viewed. If the lawyer's role in mediation is to advocate for the client, then a reduced opportunity for lawyers to develop trial experience presents a problem for mediation. If the lawyer's role is to work collaboratively with the client to pursue the client's goals, to apply mediation skills, to advise the client about the legal case and to support the client in a consensus based decision-making process, then adversarial skills and experience are less relevant. Chapter 5 explores lawyers' perspectives of their role in mediation.

4.3.4 Imbalances between legal practitioners

Some concerns were expressed during interviews about the imbalanced representation that sometimes existed in court-connected mediation. This concern emerged in response to the questions 'What skills or knowledge does a legal practitioner need to participate effectively in mediation' and 'What disadvantages does the mediation process have?' For example:

²⁵⁶ Lawyer 35.

I think one disadvantage is that the outcome for the client is only as successful as the representative allows it to be in terms of how much preparation they put into it, and how good they are. I've seen some absolutely terrible situations in mediation where senior practitioners put one over a junior practitioner at the expense of the parties, and it's really a dreadful thing to see. Also sometimes solicitors who've given bad advice can find themselves in a situation of conflict.²⁵⁷

In the following example a more senior practitioner allegedly attempted to take advantage of the inexperience of a junior practitioner, who related the following story:

I was acting for a plaintiff, and I was very junior, and the solicitor on the other side, ironically, I get on really well with now, very senior, and acted for the Board. And tried to put me down in front of my client, on the basis that I was inexperienced, and yeah, really unprofessional, and said directly to the plaintiff 'well, you should have been advised on this, this and this.' And the client stood up and said, well, it's probably both my worst and best experience, because the client stood up and said 'Well actually I have, and I don't like you speaking to my solicitor like that.' And it was hilarious, because the client said 'I can't believe he said that' sort of thing. ... But that solicitor actually came up and apologised to me afterwards and said 'look that was really wrong of me to say that and I shouldn't have done that, and even if you hadn't advised I shouldn't have done that.'²⁵⁸

This story demonstrates that there are legal practitioners who are prepared to take advantage of power differentials between themselves and another practitioner. Not only do power imbalances exist, but they may at times be exploited to promote the adversarial interests of a client. This is a clearly competitive tactic and contrary to the cooperative opportunity of mediation.

²⁵⁷ Lawyer 21.

²⁵⁸ Lawyer 31.

The imbalance between lawyers was commented upon by one of the mediators, who noted that such imbalances occur in the courtroom as well.²⁵⁹ In the courtroom, judges may provide some assistance to junior lawyers through subtle questioning and by applying formal rules of procedural fairness. A legal practitioner suggested that mediators should control the behaviour of lawyers:

Mediators need to become more active in controlling the process and behaviour of legal practitioners. Litigators need and want control, and have a personal investment in the case. Mediators ought to be more proactive in dealing with tremendous imbalance between lawyers.²⁶⁰

The practitioner did not elaborate as to how mediators ought to deal with power imbalances between legal practitioners. One of the mediators referred to the importance of the mediator in managing uneven representation, but again did not specify how this could be managed:

...and solicitors and barristers who are good, we often they don't even need me really. If they're equally as good. It's hard when you get one good one and one who's hopeless, one who's just known for costs. They are really much harder to manage because often costs are the driving factor between the solicitor and the client.²⁶¹

Clearly there is sometimes an imbalance of power between lawyers who participate in the Court's mediation programme and this imbalance presents challenges for both mediators and the legal profession. Mediators, like judges, have some opportunity to address imbalances between lawyers. This distinguishes mediation from lawyer negotiation, which is not supervised by a third party. There is an opportunity for power to be used to maximise results for clients in lawyer negotiation. Mediation

²⁵⁹ Mediator 3.

²⁶⁰ Lawyer 2.

²⁶¹ Mediator 1.

may therefore provide a safeguard to unfairness when compared to the alternative process of negotiation. The degree to which this can be achieved depends upon the extent of mediator intervention.

4.3.5 Some conclusions about legal practitioners in the Court's mediation programme

In summary, because the mediation programme operates within a small jurisdiction, regular participants such as lawyers, mediators and insurer representatives are familiar with one another and expect to deal with each other again in the future. Few legal practitioners have been formally trained in negotiation or mediation. Most legal practitioners have obtained their understanding of court-connected mediation through experience. Most legal practitioners believe that experience, by general legal practice, mediation experience or trial experience, are appropriate ways to develop the skills necessary for participating effectively in mediation. The opportunities for junior lawyers to observe senior members of the profession, either in mediation or at trial, have diminished, as has the opportunity for junior legal practitioners to obtain trial experience. There is a perception within the legal profession that there is an imbalance of experience within the legal profession that can lead to unequal competence at mediation.

The degree to which the features summarised above are problematic depends upon the goals of the mediation programme. For example, familiarity between the professional participants in mediation may help to foster an atmosphere of cooperation. If the purpose of the programme is to settle litigated matters and to deliver the consequential cost savings to disputants and the Court, then familiarity

may be a useful feature. However, if one of the fundamental aims of the programme is to create a disputant-centred process, over-familiarity between repeat players may be more problematic. In relation to the training of lawyers in mediation, if it is not intended that lawyers employ additional skills in mediation, then it is not problematic that they rely on their experience in legal practice and their general legal training. If however, mediation requires new dispute resolution skills such as interest-based bargaining or attention to the non-legal as well as legal needs of the disputants, then lawyers ought to have adequate training in relation to those matters. One lawyer interviewee was quite blunt about the lack of adequate training provided in relation to the Court's programme:

Law school practice and the Supreme Court and all the other courts have never run anything on how to do a mediation, and they've made it compulsory and have completely changed the role of advocates in this jurisdiction from old fashioned adversarial gladiatorial battles in court to us all having to be touchy feely and nice and trying to do things to being open and having a more inquisitorial litigation system with court intervention and not one person in the court has ever done anything to help anybody learn how to come to grips with any of those skills. I think that's pathetic and I think that is why there are so many people who do it so badly in the sense of no one has ever actually sat down and learnt it.²⁶²

Furthermore, the degree to which imbalanced experience is a problem within mediation depends upon whether or not that experience is relevant to the role of lawyers in court-connected mediation. It also depends upon the mediator's ability to address imbalances between legal practitioners or disputants. The nature of the Court's mediation programme, including the role played by mediators, is discussed in the following part. Lawyer practices in court-connected mediation are considered further in Chapter 5 where more of the lawyer interview data is analysed.

²⁶² Lawyer 41.

5 Styles of mediation practice

A range of mediation processes was described in Chapter 2. It has been noted in this chapter that there is little guidance about the way that mediation should be conducted at the Court. The style of mediation is therefore determined by the mediators and other participants in the mediation process. Any preferences expressed by legal practitioners and disputants in relation to the style of process are influential. If the mediator does not control the mediation process and takes a more passive role, then the other participants will determine the style of mediation that is conducted. In Chapter 2 it was noted that the control that a mediator exercises over the process varies considerably between purposes and practice models.

A range of styles of mediation are conducted within the Court's programme. It was expected that the mediators would adapt their style according to the nature of the dispute and the identities of the participants. Mediators reported that this was particularly the case in relationship, estate, some commercial and some professional negligence matters.²⁶³ The style of mediation adopted in motor vehicle and workplace personal injuries, debt collection and some professional negligence matters is more predictable.²⁶⁴ The interviews of mediators also revealed variation between the individual mediators' tendency to adopt particular styles.

²⁶³ This was reported by two mediators. The conclusion does not derive from lawyer interviews or observations.

²⁶⁴ See [3.5] above.

5.1 Mediator control of process

Mediators had different views of their role in managing the mediation process. One mediator commented that the mediator ought to control the process in such a way that the participants are unaware of the way the process is being managed:

You've got to be so good at steering the thing that nobody knows you are in fact steering or notices how you have steered it.²⁶⁵

This mediator saw process control as an important task of the mediator. The other mediators mentioned that there was a need to adapt the format to suit the particular disputants in a case, but otherwise made no mention of mediator control of content. Their comments indicate an element of responsiveness applied to the court-connected mediation programme. Some mediators take a more active role in mediation than others. The following lawyer's comment confirmed this perception:

In reality, I think that it depends very much on who the mediator is, the style of how the mediation goes. Some mediators are quite interventionist and will be quite directive and put quite a lot of pressure on, and others just will simply not, and let the parties take control of the proceedings.²⁶⁶

The evidence from interviews demonstrated that many lawyers perceive that mediators do not actively control the mediation process. This is demonstrated by the following comments:

The role of the mediator is to stop lawyers hitting each other. It's as simple as that. They facilitate, they have a room and they set up a time. And the tea and coffee's there and the water's there and that's what it is. I don't see them as being in a menial position, but in terms

²⁶⁵ Mediator 4.

²⁶⁶ Lawyer 21.

of what actually happens at the mediation they can be very useful if it gets bogged down and they can move things a bit, but to me they are irrelevant.²⁶⁷

I don't have any difficulties with ... any of them, but the parties are doing most of the work. It's almost as if the mediator is incidental. I think that there should be a process where rather than parties doing the usual 'well this is the case on liability, this is what's happened, this is why we say that the defendant was negligent blah blah blah blah.' And just rehashing what is in front of everybody through the pleadings rather than going onto quantum, just rehashing what is in front of everyone in the particulars. It would be more useful for parties, and perhaps for mediation to require parties to drill into what in fact the issues are at an early stage. So you just do away with all of the pussy-footing around, all the airy fairy stuff and just get into the issues and perhaps whoever's conducting the mediation could be bit more proactive in getting parties to direct themselves to that.²⁶⁸

Mediators typically take a passive role and let the practitioners conduct the negotiations. This means that if one side treats the mediation as a fishing expedition and won't answer questions asked by the other side, the mediator won't make them.²⁶⁹

There appears to be some desire within the legal profession for more mediator control of the process.²⁷⁰ However, it may be that mediators are exercising control in a subtle way, which is not easily perceived by some lawyers. It is difficult to draw definitive conclusions about the degree of control of the mediation process that mediators adopt because of the different perspectives that were demonstrated in the interviews. However, there are indications that some lawyers would appreciate a more obvious exercise of control by mediators.

²⁶⁷ Lawyer 36.

²⁶⁸ Lawyer 20.

²⁶⁹ Lawyer 2.

²⁷⁰ See Chapter 5 [4.2.1] for further discussion of lawyers' views in relation to this.

One of the lawyers, who is a trained mediator (not a mediator within the Court's programme), commented that the mediators at the Supreme Court of Tasmania needed to manage the mediation process, rather than conducting facilitated incremental bargaining:

I think that they need to slant it more to mediation rather than a bargaining session, ie. there's three simple steps in a mediation. The first one is where you ask the parties 'what are we here for? what do we want to achieve?' The answer is a fair resolution. And then they state their case, and the mediator says 'well what options exist to achieve that aim?' And then when they come up with options, well you just say 'well how is that option going to achieve our aim?'... The mediators down there don't ever start off with an aim. And that's the way a mediator can control a mediation, he just establishes an aim in minute number one, in the first five minutes, and if the mediation's getting out of hand, and people are just rabbiting on, then you say 'how is what you've just said going to achieve our aim?'²⁷¹

The absence of a clearly articulated aim, not just in regard to a particular case but also generally in respect of the Court's mediation programme, may frustrate the mediators' ability to control the mediation process. Without clarity of expectations about the nature of the process, including the role of the mediator, it is difficult to justify the imposition of either facilitative or evaluative approaches. If the mediator does not have a basis on which to limit mediations to either of these approaches, then the likelihood of adversarial positional, incremental or distributive approaches to the process is high. In other words, the style of mediation may mirror a settlement conference where the goal is to reach a settlement. That settlement may not reflect a consideration of either the legal issues or the individual interests of the disputants.

²⁷¹ Lawyer 12.

During the interviews, there was no mention by lawyers or mediators of the role of the mediator to encourage and facilitate direct disputant participation in the mediation process. Mediators are in a position to enhance opportunities for direct disputant participation.²⁷² Without such encouragement, it is likely that legally represented disputants will not participate directly in the mediation process because they have a person who is able and most likely very willing to speak on their behalf. The attitudes of lawyers towards direct disputant participation are explored further in Chapter 5. The evidence suggests that mediators tend not to actively encourage direct disputant participation. One mediator talked about providing an opportunity for disputants to participate directly, but only in private sessions and in a limited way.

Then we go into private sessions and that's when I really let them have their say. I try and keep it on track a bit because sometimes they just interrupt and won't listen at all. So that's a bit of a juggling act about how much they talk. So I just say if you have got any questions, this is your time to say what you want to say.²⁷³

This mediator appears to have firm views about the appropriate scope of disputant participation being limited to the private sessions and guided to matters that are considered relevant by the mediator.

Another mediator drew a distinction between personal injuries cases and estate cases, where it is much more likely that the disputants would participate directly in the proceedings and express their non-legal issues and relationship needs.²⁷⁴ One

²⁷² Boulle (2001), above n152, [5.16]; Micheline Dewdney, *Party, Mediator and Lawyer-Driven Problems and Ways of Avoiding Them* (2007) LEADR <www.leadr.com.au/articles> at 25 June 2007.

²⁷³ Mediator 1.

²⁷⁴ Mediator 2.

mediator referred to the lawyers' control over direct disputant participation.²⁷⁵ The tendency is for mediators to leave it to lawyers to decide the extent of direct disputant participation. The mediators are supportive and encouraging of direct disputant participation, but this tends only to happen when the lawyers and disputants have made a decision that the disputant will participate directly. The control over the decision is therefore left to the dynamics of lawyer-client relationships.

5.2 Style of bargaining

Within some mediations, particularly of personal injuries and debt collection matters, the bargaining process is conducted in an positional manner rather than a problem-solving manner. The focus is on the law and the making of offers rather than the exploration of a broader range of issues or expansion of options. This was observed in the following interview response to the question directed to lawyers 'How does a typical mediation work at the Supreme Court of Tasmania?'²⁷⁶

Mediator facilitates introductions. Plaintiff's lawyer gives an outline of their case, I usually interrupt at that point and say 'do you mind if I ask questions of the plaintiff' as you go through that outline?' Then defendant's solicitor outlines their case. Usually then there's a break, mediator talks to both sides. Come back and usually defendant makes an offer. Goes on until you reach a settlement.²⁷⁷

This is a description of a facilitated settlement negotiation in the positional bargaining style, not an interest-based or disputant-centred process. The lawyers are the active participants, the focus is on the making of offers rather than sharing of interests and settlement is the desired outcome.

²⁷⁵ Mediator 3.

²⁷⁶ Because a significant number of lawyers were not asked this question due to time constraints, percentages are not produced in relation to this question.

²⁷⁷ Lawyer 9.

The approach described in the following comment reflects a focus on a purely monetary outcome:

I tell them how much money I want and why and they tell me why I can't get any money and why. Then you talk about it and then you go out and exchange offers and the mediator talks to them to persuade them to come into the middle.²⁷⁸

Again, the style of bargaining according to this description is positional. Settlement mediation involves 'incremental bargaining towards compromise',²⁷⁹ which is what is described by this lawyer. The settlement model was also described by the following interviewee when asked to describe the typical mediation at the Court:

Usually there's quite a lot of shuttle diplomacy and posturing, and a gradual erosion sometimes towards a resolution.²⁸⁰

Some other lawyers described another style of negotiation where, rather than incremental monetary bargaining, the focus is on winning a legal argument. Here, the lawyers present their legal arguments to one another. In this style of mediation, the legal issues are presented as they would be in Court, for the purpose of persuading one another of the relative strengths and weaknesses. For example:

The mediator gives their little spiel ... The plaintiff's lawyer gives his outline in which he tries to scare the defendant as much as he can about what could happen. Then the defendant's lawyer then answers and when he's doing that he's tends to be (a) scaring the plaintiff by telling the plaintiff he's going to lose and not do so well, and (b) undermine ... the plaintiff's confidence in his own lawyer. That's a strategy and that's going to depend upon various cases, but there are going to be cases where you are worried that the plaintiff really hasn't been properly advised, fully advised by his lawyer about the case, and may have been misled as to how good his case is. So in that

²⁷⁸ Lawyer 11.

²⁷⁹ Chapter 2 [3.3.3].

²⁸⁰ Lawyer 21.

situation you might want to have it so the plaintiff is questioning how much he can rely upon his, on the advice he is given. ... [O]ne thing you don't want to do is lose a skirmish. That's quite important in terms of, losing a skirmish on the way knocks off, knocks dollars off how much you're going to get if you're a plaintiff and adds dollars on to how much you're going to pay if you're a defendant.²⁸¹

Presumably the purpose of the presentation of the arguments is to persuade the opposing client that their case is weak and that they ought to make concessions. The process that is described does not emphasise a cooperative approach to the resolution of the shared dispute. Where there is an almost exclusive focus on legal issues, there are attempts to persuade one another to compromise, the style of negotiation is adversarial and the lawyers dominate, the style of process is consistent with the approach that would be expected in a traditional settlement conference. A settlement conference is a conference conducted for the purpose of exploring the possibility of settlement before a litigated matter is allocated a trial date. The mediation process at the Court is often referred to as a 'settlement conference'.²⁸² In a settlement conference the expertise of a third party may be utilised to pursue the purpose of reaching a settlement that is in accordance with the legally available outcomes. There is a consistent perception amongst lawyers and mediators that settlement is the primary aim of the programme. The way that participants approach the process tends to reflect that aim.

5.3 Evaluation by mediators

The mediators, like the lawyers, were asked 'Should a mediator ever advise disputants about the value of a claim or the likely result if a matter proceeded to

²⁸¹ Lawyer 5.

²⁸² The term 'settlement conference' is used by many lawyers and mediators who were interviewed.

trial?’ Three of the four mediators interviewed said ‘no’ and one said ‘yes’. Two of the ‘no’ answers were:

No. Not unless they’ve got professional indemnity cover.²⁸³

No, I think you’ve got to say. ... Oh I often say what I think but I certainly wouldn’t give advice. ... but you do put in your two bobs worth but you have to be really careful. ... But sometimes they may ask you and you know that they’re wanting you to underline the advice that they have given if it’s not being listened to, of the risks.²⁸⁴

This mediator appeared to be reluctant to admit that evaluation of the content of the mediation was part of their practice. This was perhaps because this mediator was of the opinion that the giving of legal advice by the mediator was inappropriate. By contrast, one of the mediators was of the opinion that evaluation was an acceptable part of the mediator’s role:

Yes. I almost always do it... given the seniority of the counsel [at the Supreme Court] I usually wait until I am asked.²⁸⁵

The mixed opinion amongst the mediators about the appropriateness of mediator evaluation explains the evidence from lawyers that there is a mixed practice of mediator evaluation between the mediators.

Lawyer interviewees were asked ‘Should mediators ever advise disputants about the value of a claim or the likely result if a matter proceeded to trial?’ Their opinions in relation to the ‘should’ question are analysed in Chapter 5 [4.2.3], but some comments were made in response to this question which gave insight into whether or not the mediators at the Court do in practice provide such advice.

²⁸³ Mediator 3.

²⁸⁴ Mediator 1.

²⁸⁵ Mediator 4.

A number²⁸⁶ of legal practitioners reported that the mediators do at times evaluate the merits of a case or predict the likely result if a matter proceeded to trial. For example:

There have been occasions where mediators have called it quite incorrectly. One particular case that went to the High Court of Australia...²⁸⁷

I've often had someone like [mediator] who can be invaluable in that sort of thing, but at the same time sometimes they might go a bit far and you just think 'Why did you say that, you don't need to say that.' It's a bit of a fine line.²⁸⁸

The second of these comments reflects a view that was shared by some other practitioners who had experienced mediator evaluation. Lawyers tended to approve of mediator evaluation when the mediator's opinion confirmed their own advice to their client, but did not approve of mediator evaluation when their advice to their client was contradicted.

There were some legal practitioners who had not experienced any evaluation by mediators in the Supreme Court of Tasmania's programme.²⁸⁹ It is possible that mediators vary in evaluative practices depending upon the experience of the lawyers attending mediation.²⁹⁰ For example, more senior and experienced lawyers may be asked to share their opinions rather than the mediator proposing their own view.

²⁸⁶ Numbers have not been produced in relation to this indicator because there was no specific question that invited the interviewees to indicate whether or not the mediators do evaluate in practice. Therefore it would not be appropriate to assert that a certain proportion of legal practitioners had particular experiences in relation to mediator evaluation.

²⁸⁷ Lawyer 24.

²⁸⁸ Lawyer 23.

²⁸⁹ For example, Lawyer 39 'I've never seen it done in this state.' This particular lawyer reported having participated in between 11 and 20 mediations in the twelve months prior to the interview, making him one of the lawyers with greater experience at mediation.

²⁹⁰ It is not appropriate to draw comparisons on the basis of experience from the data owing to the small sample size.

Also, a mediator may be more willing to express a view if it is perceived that the lawyer has given erroneous advice to their client.

The following examples illustrate the divided opinion amongst practitioners who have no experience of mediator evaluation about whether or not the mediators ought to be evaluating in the programme:

They actually thankfully don't do that in my experience in the Supreme Court ... In the Supreme Court the mediators will come out and say 'well how do you think you're going to go?' and they'll say 'how do you think this is going to look in court?' and whatever, but in my experiences they've never once said 'look, the outcome is likely to be this.' And I think that's how it should be.²⁹¹

My general experience is that they don't, but in some circumstances and provided that the mediator was qualified to do so, then in some circumstances it might be helpful.²⁹²

The lack of guidelines governing the programme probably exacerbates such diversity of experience and opinion within the programme, which is problematic if expectations are not being either met or modified.

²⁹¹ Lawyer 10.

²⁹² Lawyer 9.

5.4 Content of mediations

The manner in which legal practitioners prepare themselves and their clients for mediation emphasised the almost exclusive commercial and legal content of mediation at the Court. Many practitioners reported telling their client that they needed to ‘let go of their principles’ because the litigation was only about money and that was all they were going to get from their opponent, rather than satisfaction of principle:

I often like to encourage them to put so called ‘matters of principle’ behind them and to think about their pockets and the bottom line for them.²⁹³

I always talk to them about not going into mediations with ‘it’s not the money, it’s the principle of the thing,’ because that’s a dangerous one.²⁹⁴

...I think it is really important to have them understand how difficult litigation is, in other words they need to discount their expectations one way or the other for the fact that they are going to avoid litigation. If you are a small businessman who is involved in a case that is going to go to trial you’re going to expect while the trial’s on that you’re not going to be doing business, you’re going to have sleepless nights, all those sorts of costs that people don’t factor in and that are never going to be recovered, and that affect business. You need to draw that to people’s attention because frequently they will say to you - well it’s not really about the money it’s the principle, and frequently bang the desk when they say it. To which I usually say well that’s fine if you want to pay for your principles, but this isn’t about principles it’s about dollars. That’s all it’s about, that’s what litigation is about. It may be that you get some sense of vindication if you win, and maybe you’d be deprived of that at mediation because there is no sense of whether or if you are a winner or a loser coming out of mediation, maybe in your own mind, but there’s no sense of vindication. And that remains quite important for individuals not so much for corporations who are focused on and for them it is all about

²⁹³ Lawyer 25.

²⁹⁴ Lawyer 21.

money. But the reality is that's what it's all about, that's all the law provides for by way of a remedy, and in a sense you can see the shock on people's faces when you tell them that sometimes because they've been brought up to believe that it's all about justice...²⁹⁵

These comments reflect a view that the aim of mediation is to reach a commercially acceptable monetary outcome. The principles that the clients of these lawyers are urged to 'put behind them' might be moral or legal principles or psychological needs such as the need for acknowledgment of wrong doing. The final comment demonstrates that from the view of that practitioner the benefit of settlement at mediation was an avoidance of a range of costs of litigation.

Other practitioners referred to their role in establishing 'realistic' expectations in their clients, meaning expectations that were likely to be achieved in the legal process:

Then you need to establish realistic expectations with the plaintiff. ... It's less important with defendants because often they have less unrealistic expectations. And I deliberately say less unrealistic as opposed to more realistic because they all have, to a large extent unrealistic expectations until you do what your job really is, and that is to make sure they understand what their case is and what it's about. But certainly with plaintiffs I think it's extremely important in preparing a plaintiff for mediation to make sure that they don't go in with an unrealistic expectation of the possible outcome.²⁹⁶

I ask the client what their expectations are. I'll probably ask them several times through the course of the litigation what their expectations are, because you want to know whether their expectations can be met by the process, because many people have very very unrealistic expectations about the process.²⁹⁷

²⁹⁵ Lawyer 35.

²⁹⁶ Lawyer 14.

²⁹⁷ Lawyer 24.

These comments demonstrate that some lawyers consider that the range of outcomes that are available at court-connected mediation are limited to the legally available outcomes. There did not appear to be widespread recognition of the potential for court-connected mediation to increase the range of potential outcomes. The second comment also demonstrates a client-centred practice, where the lawyer tailored his advice around the expectations of the client, making sure that the client understood what could be achieved from the process engaged in.

The content of mediation at the Court is primarily a discussion of the legally-defined issues, arguments and evidence. During the interviews of legal practitioners and mediators when they referred to the issues, they usually meant the legal issues as defined in the pleadings exchanged between the litigants. Observations confirmed that the content of mediation at the Court is largely restricted to the legal rights and responsibilities of the disputants, determined by the evidence in relation to the legally defined issues. Some mediators do encourage some ventilation of non-legal issues (often in private sessions), but in personal injuries and commercial matters those matters are rarely discussed in the joint session.

One mediator drew a distinction between disputes about wills and other disputes that are mediated in the Court:

In say a wills case there's often a whole series of issues, there may be issues that are outside the parameters of the dispute before the court and there may be relationships between the parties that have broken down. There may be a desire of parties to maintain relationships and they may have a whole series of issues that aren't actually covered in the dispute themselves.

... I'm fairly sure they wouldn't resolve unless you did explore those issues and allowed them to explore those issues.²⁹⁸

According to this mediator, the non-legal issues are likely to be acknowledged and aired during the mediation of estate or relationship matters. The mediator also questioned whether or not court-connected mediation was an appropriate forum for the airing of such issues. The question of the context of court-connected mediation and whether it is appropriate for non-legal issues to be resolved within that context is explored further in Chapter 6.

5.5 Summary of styles of mediation practice

In summary, the style of mediation practised in the Court in most cases promotes positional bargaining in terms of strict legal entitlements. The negotiation style tends to be in accordance with approaches that are familiar and accessible to lawyers, namely, adversarial legal argument combined with distributive bargaining towards compromise. The mediators have mixed opinions and approaches to mediator evaluation. It is perceived by the lawyers that mediators will evaluate when requested by the parties or when evaluation is otherwise considered to be appropriate. This presents a picture of a lawyer driven, adversarial process. When lawyers drive the mediation they tend to frame the dispute in terms of legally available outcomes. Mediators who evaluate reinforce the relevance and priority of the law to the disputes. The relevant legal issues tend to be the main topic of discussion in mediation at the Court, although non-legal issues are often explored, particularly in private sessions.

²⁹⁸ Mediator 2.

This description is consistent with observations about the style of court-connected mediation in other jurisdictions, including the Supreme and County Courts of Victoria, Toronto mandatory mediation programme, Ohio courts and Metropolis County Superior Court.²⁹⁹ The primarily facilitative interest-based practice in Saskatchewan contrasts with the Supreme Court's process.³⁰⁰

Although a law-focused, distributive bargaining style is the tendency in court-connected contexts, it is by no means the only style of mediation that can be practised. There are choices to be made about the appropriate style.

There was some evidence of adaptation of the mediation process to different cases in the Supreme Court, which indicates an element of responsiveness. There is, however, an assumption by mediators and lawyers that the dominant purpose of mediation is to settle the litigation, which is reflected in the style of mediation practice. The evidence supports the hypothesis that the court-connected practice would be focused on the legal issues. It also addresses the hypothesis that competitive behaviour would occur within the programme.

6 Quantitative outcomes of mediation in the Supreme Court of Tasmania

To complete the picture of court-connected mediation practice in the Supreme Court of Tasmania, some quantitative outcomes of the programme will be described. These

²⁹⁹ Sourdin (2009), above n5; Relis (2009), above n79; Wissler (2001-2002), above n78; Burns (2000), above n78.

³⁰⁰ Macfarlane and Keet (2005), above n127.

outcomes relate to the efficiency of the programme and include settlement, time efficiency and cost efficiency. Consideration of these factors is relevant to the efficiency goal of the Court in implementing the programme.

6.1 Settlement

6.1.1 Immediate settlement rates

Finalisation of litigation is the primary motivation of the Court for providing its court-connected mediation programme.³⁰¹ Therefore, it is pertinent to examine quantitative data about settlement rates. The Chief Justices have adopted inconsistent reporting practices in their Annual Reports and there has not always been disclosure of the overall number of mediations held.³⁰² The number of mediations that resulted in a settlement has been consistently published, but this figure does not reveal the proportion of mediations that resulted in an immediate settlement, the timing of settlement, the number of matters settled soon after mediation or the proportions of matters that settled with and without mediation. However, the final database³⁰³ provided information that enabled the analysis of such factors relating to settlement.

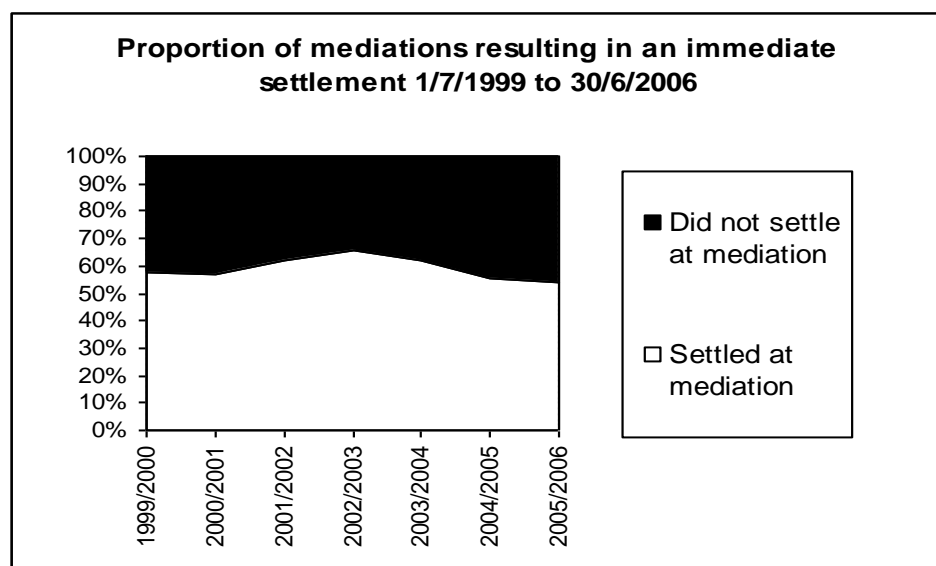
³⁰¹ This motivation is in the interests of promoting litigants' interests in settlement and not just the Court's own performance.

³⁰² The number of mediations conducted in various categories of matter is represented in a graph in the Chief Justices' Annual Reports for the years 2000/2001 to 2003/2004. The reporting practices changed with the new Chief Justice. His Annual Report for the year 2004/2005 reported numbers of settlements at mediation for categories of cases and an overall number of mediations which did not result in a settlement. However, his subsequent report for the year 2005/2006 only contained numbers of conferences that settled, not an overall number of mediations held. See Chief Justice Cox, 'The Chief Justice's Annual Report 2000-2001' (The Supreme Court of Tasmania, 2001) 10; Chief Justice Cox, 'The Chief Justice's Annual Report 2001-2002' (The Supreme Court of Tasmania, 2002) 12; Chief Justice Cox (2003), above n7, 9; Chief Justice Cox (2004), above n23, 8; Chief Justice Underwood, 'The Chief Justice's Annual Report for The Supreme Court of Tasmania 2004-2005' (Supreme Court of Tasmania, 2005) 4; Chief Justice Underwood, 'The Chief Justice's Annual Report for The Supreme Court of Tasmania 2005-2006' (Supreme Court of Tasmania, 2006).

³⁰³ Chapter 3 [3].

The first and simplest indicator of settlement is the proportion of mediations that resulted in an immediate settlement. The percentage of mediations resulting in an immediate settlement for each financial year from 1999/2000 to 2005/2006, being the years during formalisation-settling in and after mediation became formalised at the Court,³⁰⁴ are illustrated in Chart [6.1A]. It can be seen from this chart that overall rates of immediate settlement have ranged between 55% and 65%.³⁰⁵

Chart 6.1A³⁰⁶



Source: Court database

The immediate settlement rate is comparable to rates observed in other court-connected mediation programmes. Some examples of immediate settlement rates are: 41% in the Supreme Court of Victoria,³⁰⁷ 56% in the County Court of Victoria,³⁰⁸

³⁰⁴ [3.4.3] above and Chapter 3 [3].

³⁰⁵ Some of the Annual Reports report higher rates of settlement at mediation than those contained in this chart. The legal officer at the Court has informed me that for the purposes of the settlement percentages published in the Annual Reports, matters which settled soon after mediation were included in the calculations. At this point only the rates of immediate settlement are considered, but settlement after mediation is considered below at [6.1.2]. This difference explains the differences between the Court's and my statistics.

³⁰⁶ 1999/2000 N=227; 2000/2001 N=229; 2001/2002 N=297; 2002/2003 N=405; 2003/2004 N=355; 2004/2005 N=324; 2005/2006 N=256.

³⁰⁷ Sourdin (2009), above n5.

³⁰⁸ Sourdin (2009), above n5.

46% in the Local Court of Western Australia,³⁰⁹ 69% in the Supreme and District Courts of New South Wales,³¹⁰ between 48% and 55% in the Central London County Court,³¹¹ 44% in the judicial circuit of Illinois,³¹² 40% in the Ontario Mandatory Mediation programme in Ottawa and Toronto,³¹³ and 45% in Ohio courts.³¹⁴

The following Table [6.1B] contains a breakdown of immediate settlements of types of Hobart finalised matters that were mediated. Matter types other than tort, commercial, estate and relationships are not included in the table.³¹⁵

Table 6.1B**Mediation settlement rates of Hobart finalised matters**

| | Tort | | Commercial | | Estate | | Relationship | |
|--|-------------|-----|-------------------|-----|---------------|-----|---------------------|-----|
| | Number | % | Number | % | Number | % | Number | % |
| Finalised 1/7/1996 to 30/6/1999 | | | | | | | | |
| Mediated | 220 | | 28 | | 2 | | 0 | |
| Settled at mediation | 127 | 58% | 16 | 57% | 1 | n/a | 0 | n/a |
| Not settled at mediation | 93 | 42% | 12 | 43% | 1 | n/a | 0 | n/a |
| Finalised 1/7/1999 to 30/6/2002 | | | | | | | | |
| Mediated | 376 | | 41 | | 9 | | 3 | |
| Settled at mediation | 243 | 65% | 28 | 68% | 7 | n/a | 2 | n/a |
| Not settled at mediation | 133 | 35% | 13 | 32% | 2 | n/a | 1 | n/a |
| Finalised 1/7/2003 to 30/6/2006 | | | | | | | | |
| Mediated | 398 | | 76 | | 32 | | 56 | |
| Settled at mediation | 262 | 66% | 53 | 70% | 18 | 56% | 46 | 82% |
| Not settled at mediation | 136 | 34% | 23 | 30% | 14 | 44% | 10 | 18% |

Source: Court database

³⁰⁹ Howieson (2002), above n78.

³¹⁰ Sourdin and Matruggio (2002), above n5;

³¹¹ Genn et al (2007), above n88.

³¹² Schildt et al (1994), above n88.

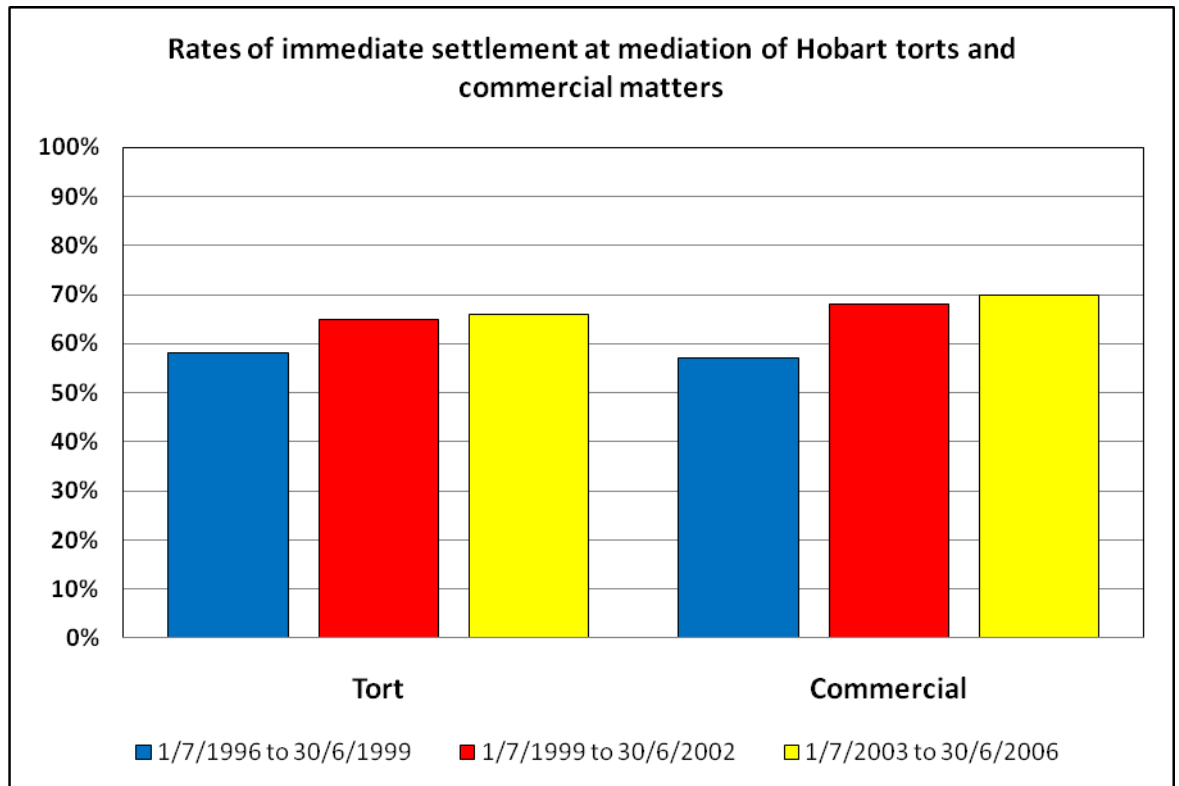
³¹³ Hann and Baar et al (2001), above n126.

³¹⁴ Wissler (2001-2002), above n78.

³¹⁵ See [Table 3.4C] above for the number of Hobart matters mediated in other types of cases.

The following Chart [6.1C] presents the rates of immediate settlement in tort and commercial matters. As in Table [6.1B], the settlement rates are for Hobart matters finalised during the three time periods:

Chart 6.1C³¹⁶



Source: Court database

Table [6.1B] and Chart [6.1C] demonstrate that the rates of settlement of tort and commercial matters have increased over time, and in the years during formalisation-settling in and after formalisation³¹⁷ have ranged between 65% and 70%. The smaller number of matters mediated in estate and relationship types of cases in the earlier time periods make it inappropriate to analyse the percentages for those periods. The high rate of immediate settlement of relationships matters in the years after formalisation may be contributed to by the willingness to explore a broad range of

³¹⁶ Ns as per Table 6.1B.

³¹⁷ The three year periods analysed in this chapter are defined in [3.4.3] above and Chapter 3 [3].

interests and to involve disputants directly in these kinds of matters.³¹⁸ Without feedback from the disputants in these cases, this link cannot be tested. Some other studies have demonstrated such a link. For example, Bartlett's investigation into the 1993 Settlement Week in New South Wales found a significant correlation between the degree to which a litigant considered he or she was able to express a point of view to the other side and the degree of satisfaction derived from the mediation process.³¹⁹

6.1.2 Settlement after mediation

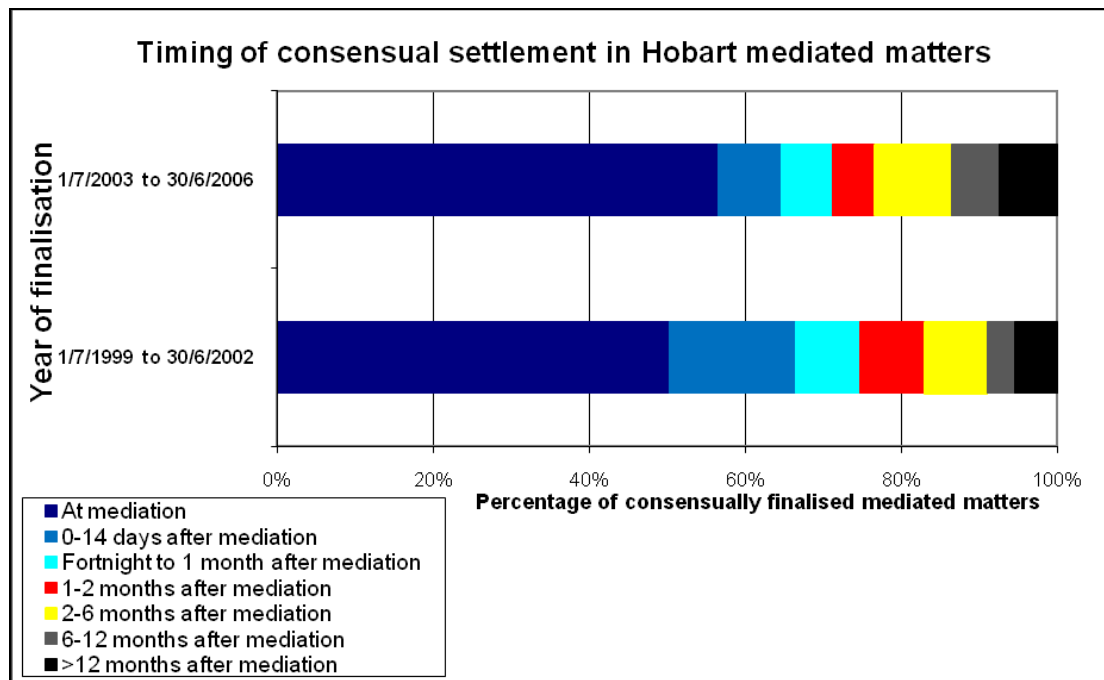
One of the shortfalls of reporting only immediate settlements at mediation is that it ignores the impact of mediation in focusing the attention of disputants on settlement. That impact can be investigated by looking at settlements reached after mediation. Chief Justice Cox noted in his Annual Reports from 1999/2000 to 2003/2004 that mediation can influence the settlement of litigated matters soon after mediation.³²⁰ The following Chart 6.1D refers only to Hobart mediated matters. Mediations that were adjourned and reconvened at a later date were omitted from consideration. Only the final mediation in each matter was included in the analysis. The chart compares three years of formalisation-settling in and three years after formalisation:³²¹

³¹⁸ See the distinction in the format of mediation in these kinds of matters in [3.5] above.

³¹⁹ Bartlett (1993), above n174. See discussion at [5.2] above in relation to disputant preference for an opportunity to participate directly, particularly references to Relis (2009), above n79.

³²⁰ See Chief Justice Cox, 'Report of the Chief Justice of the Supreme Court of Tasmania : Annual Report 1999/2000' (Supreme Court of Tasmania, 2000) 8; Chief Justice Cox (2001), above n302, 10; Chief Justice Cox (2002), above n302, 12; Chief Justice Cox (2003), above n7, 9 and Chief Justice Cox (2004), above n23, 8.

³²¹ The three year periods analysed in this chapter are defined in [3.4.3] above and Chapter 3 [3].

Chart 6.1D³²²

Source: Court database

The chart demonstrates that most mediated matters that will be consensually resolved do settle at mediation, but there is also a significant proportion of mediated matters that settle soon after mediation. In Hobart between 1 July 2003 and 30 June 2006, 57% of consensual settlements of mediated matters were made at mediation. A further 14% occurred within one month following mediation. Between 1 July 1999 and 30 June 2002 the rate of immediate settlement was just over 50% and a further 24% settled within one month of mediation.

Settlements that occur within two weeks of mediation are likely to have been strongly influenced by the mediation discussions. The connection between mediation and settlement is less likely the longer period of time there is between the two occurrences. Chart [6.1D] indicates that 8% of consensual settlements occurred

³²² 1999-2002 N=413; 2003-2006 N=502.

within that time period in the years after formalisation and 16% in the three early years of formalisation-settling in. These figures show that although the rates of immediate settlement have risen after formalisation, the proportion of matters settling within two weeks after mediation has fallen.

Chart [3.4B] showed that mediations held after formalisation tended to occur earlier in the litigation process. Therefore, matters which do not settle at mediation are further from trial than in the earlier years of formalisation-settling in. The high rate of settlement soon after mediation in the earlier years may be related to the imminence of a trial date as much as having been contributed to by mediation. Prior to 2001 many matters were referred to mediation after the judges' papers had been filed. The imminence of a trial date was once the main impetus for settlement during the litigation process before the adoption of court-connected mediation. Between 1 July 1999 and 30 June 2002 (the years of formalisation-settling in), 17% of mediations were held after a trial date had been allocated. By contrast, between 1 July 2003 and 30 June 2006 (the years after formalisation) the proportion had fallen to only 4%. Additionally, a further 16% of mediations in the earlier years and 10% in the later years occurred after the judges' papers had been filed. In matters referred either after the allocation of a trial date or after a matter was apparently ready for trial, both the mediation process and the 'shadow of the court' would have powerful influence on settlements agreed at mediation. In the earlier years of formalisation-settling in, this group made up 33% of mediations, whereas in the later years after formalisation only 14% of mediations occurred so late in the litigation process. The proportion of matters finalised more than six months after mediation has risen in the

later time period, which may result from mediation occurring earlier in the litigation process.

6.1.3 Proportion of finalisations that follow mediation

The number of finalisations that occurred with and without mediation may also be considered when assessing the impact of court-connected mediation on settlement. It is, however, misleading to attribute the changes which have occurred over time solely to the mediation programme. The numbers are presented below, but caution needs to be exercised in making connections between them and mediation. Between 1999 and 2006 a number of significant changes occurred in relation to the nature of the workload of the Court. Legislation such as the *Civil Liability Act 2002* (Tas) and the *Relationships Act 2003* (Tas) caused the types of matters filed at the Court to change. The case management practices at the Court have evolved over the relevant time period and those changes, if they were effective, are likely to have impacted on the finalisation of litigated matters.

First, to demonstrate the context within which mediation occurs, the following Table [6.1E] shows the manner of finalisation of Hobart tortious matters finalised between 1 July 1999 and 30 June 2006. Torts matters have been chosen because the overwhelming majority of mediations at the Court occur in these types of matters.³²³

³²³ See [3.4] and [Table 5.1B] above.

Table 6.1E**Manner of finalisation³²⁴ of Hobart torts matters 1999/2000 to 2005/2006**

| | 1999/2000 | 2000/2001 | 2001/2002 | 2002/2003 | 2003/2004 | 2004/2005 | 2005/2006 |
|--|------------|------------|------------|------------|------------|------------|------------|
| Not defended ³²⁵ | 7 | 1 | 10 | 3 | 3 | 2 | 6 |
| Not proceeded ³²⁶ | 33 | 21 | 31 | 14 | 35 | 23 | 17 |
| Consensual finalisation (other) ³²⁷ | 492 | 372 | 516 | 486 | 443 | 352 | 241 |
| Finalisation by Court ³²⁸ | 23 | 107 | 34 | 38 | 29 | 27 | 20 |
| Total | 555 | 501 | 591 | 541 | 510 | 404 | 284 |

Source: Court database

Table [6.1E] demonstrates that most torts finalisations are by consent, or otherwise resolve without determination by the Court. The overall number of torts finalisations has declined steadily since 2001. This is consistent with the overall decline in torts matters filed, which will be discussed at [6.3.3] below.

³²⁴ There appears to be some inaccuracy in the finalisation codes on the Court database. Court staff may have entered incorrect codes. For example, 'CJ' may have been used to indicate 'consent judgment' rather than 'court judgment.' A random audit of twenty matters found that three infant's compromises were incorrectly recorded as 'CJ' (Court Judgment) rather than 'FCO' (Final Consent Orders). Other potential mistakes are that 'FCO' (final consent order) and 'FO' (final orders from a hearing) may have been confused. There is no practical way to test the accuracy of the entries onto the database without reviewing the original court files, which is impractical. This data should be read with some caution. Some of the codes entered were invalid, such as 'DDN', 'ADJ', 'MCO', 'MDC', 'MFO', 'JP' and 'JUD.' There has been no revision of the accuracy of finalisation codes by the registry supervisor. Therefore the data in [Table 6.1E], [Table 6.1F] and [Table 6.1G] ought to be treated cautiously.

³²⁵ Matters classified as 'Not defended' include finalisation codes DEF (default judgment), DD (default of defence) and DDN.

³²⁶ Matters classified as 'Not proceeded' include finalisation codes AB (apparently abandoned), DIS (discontinued) and ADJ.

³²⁷ Matters classified as 'Consensual finalisation (other)' include finalisation codes CON (consent judgment), MED (settled by mediation), AG (agreement), FCO (final consent order), MCO, MDC and MFO.

³²⁸ Matters classified as 'Finalisation by Court' included CJ (court judgment), FO (final orders from a hearing), BNK (bankrupt), JP and JUD.

The following Table [6.1F] shows the number of torts finalisations in each category that were mediated at some time during the litigation process.

Table 6.1 F

Hobart torts finalisations that were mediated 1999/2000 to 2005/2006³²⁹

| | 1999/2000 | 2000/2001 | 2001/2002 | 2002/2003 | 2003/2004 | 2004/2005 | 2005/2006 |
|--|------------|------------|------------|------------|------------|------------|-----------|
| Not defended ³³⁰ | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Not proceeded ³³¹ | 3 | 3 | 2 | 0 | 11 | 3 | 4 |
| Consensual finalisation (other) ³³² | 112 | 100 | 141 | 119 | 166 | 121 | 71 |
| Finalisation by Court ³³³ | 3 | 11 | 1 | 9 | 7 | 7 | 6 |
| Total | 118 | 114 | 144 | 128 | 184 | 131 | 81 |

Source: Court database

Information from Tables [6.1E] and [6.1F] has been used to produce the following Table [6.1G], which demonstrates the proportion of torts finalisations that occurred after being referred to mediation at some stage during the litigation. The categories of ‘consensual finalisations’, which includes the ‘not proceeded’ and ‘consensual finalisation (other)’ categories from the tables above, and ‘finalisation by Court’ have been used.³³⁴

³²⁹ Mediation statistics for 2002/2003 are unreliable. See above n86.

³³⁰ See above n325.

³³¹ See above n326.

³³² See above n327.

³³³ See above n328.

³³⁴ Matters classified as ‘not proceeded’ include discontinued actions, finalised by a Notice of Discontinuance. Discontinued matters may be the result of a consensual agreement. For example, where the parties enter into a Deed of Release which provides that the legal action will be discontinued as a term of settlement.

Table 6.1G³³⁵**Percentage of Hobart torts finalisations in which the matter was mediated**

| | % Total torts finalisations after/at mediation | % Consensual finalisations after/at mediation | % Finalised by Court after mediation |
|---------------------------------|---|--|---|
| 1999/2000 | 21% | 22% | 13% |
| 2000/2001 | 23% | 26% | 10% |
| 2001/2002 | 24% | 26% | 3% |
| 2002/2003 ³³⁶ | 24% | 24% | 24% |
| 2003/2004 | 36% | 37% | 24% |
| 2004/2005 | 32% | 33% | 26% |
| 2005/2006 | 29% | 29% | 30% |

Source: Court database

The second column of Table [6.1G] shows that the proportion of torts matters that were mediated before they were finalised ranged between 21% and 36%. The percentage of finalised matters that were referred to mediation peaked in 2003/4 and decreased steadily since. In 2005/6 the percentage of torts matters that were mediated before finalisation was higher than the proportion in the years prior to 2003/4 (the years of formalisation-settling in).³³⁷ After 2003/4, more torts matters were referred to mediation at some stage in the litigation process than before. However, a significant majority of torts matters were finalised without referral to mediation.

The third column of Table [6.1G] demonstrates that the proportion of consensual finalisations that were mediated before finalisation ranged between 22% and 37%. This means that between 63% and 78% of torts matters that resolved by consent did so without court-connected mediation. Those matters that are resolved by consent but

³³⁵ Ns as in Tables 6.1E and 6.1F.³³⁶ Mediation data for the year 2002/2003 is unreliable. See above n86.³³⁷ [3.4.3] above and Chapter 3 [3] describe the three year periods that are analysed in this chapter.

which are not referred to mediation are likely to have been settled by the traditional means of lawyer negotiation. It should not be surprising that many matters continued to be resolved consensually outside the mediation process. As information is obtained and exchanged between lawyers and their clients the likelihood of reaching agreement increases. Mediation has provided a forum for the exploration of settlement, however, this formal forum may be more expensive and difficult to organise than negotiation outside mediation. Therefore mediation is not always the appropriate forum in which to discuss the resolution of the dispute. The percentage of torts matters that were resolved by consent after referral to mediation rose after mediation became formalised. This could be because mediation is preferred by some lawyers or disputants as a method of resolution or that the Court has sometimes encouraged or ordered referral to mediation in preference to more informal negotiation.

Despite the Court's policy that a trial date will not normally be allocated before mediation has been attempted, there are some matters that go to trial without being mediated. The fourth column of Table [6.1G] shows the percentage of matters that were finalised by the Court and were referred to mediation at some stage prior to finalisation. It is clear that most court determined torts finalisations occurred without mediation having occurred. The percentage of judicially determined torts outcomes that were made without reference to mediation ranged between 70% and 97%.

However, the proportion of judicially determined matters that were referred to mediation rose steadily since 2002/3, once the Court had successfully reduced its backlog of civil matters awaiting finalisation. This means that the Court enforced its policy of referral prior to the allocation of a trial date in up to 30% of torts matters

which proceeded to trial. It may be that the other matters which proceeded to trial were deemed to be inappropriate for mediation. The preceding tables showed that the number of torts matters which were resolved by court determination was much lower than the number of consensual finalisations. Therefore, it may be that the Court has been successful in encouraging matters which are capable of settlement to settle prior to trial. The fact that less than 30% of the tried matters were referred to mediation may be an indicator of the success rather than problems with the Court's referral practices. In only 30% (at most) of matters which were destined for trial had mediation occurred. In many of these matters mediation may have provided an opportunity to clarify the legal issues and to narrow the areas of disagreement between the parties. For some of these litigants, however, mediation may have added time and cost to the litigation process.

6.1.4 Summary of settlement data

In summary, between 55% and 65% of mediations at the Supreme Court of Tasmania result in an immediate settlement. Settlement rates in most cases, namely tort and contract disputes, have increased over time. An additional and significant proportion of matters settle within one month of mediation.³³⁸ If the number of matters that settle within that time period is taken into account, then the mediation settlement rates rise to between 71% and 75%.

Although the settlement rates of mediated matters are high, most consensual finalisations occurred without referral to mediation. Between 1999 and 2006, an average of 72% of consensual finalisations of tortious actions were reached without

³³⁸ Chart [5.1D].

court-connected mediation.³³⁹ This suggests that mediation is not being conducted unnecessarily in the significant majority of cases that are destined to resolve by consent. Mediation provides an additional process but does not appear to have replaced unassisted negotiation as the most common method of resolving litigation.

A growing proportion of matters that are finalised by the Court have been mediated. In 2005/2006, 30% of court-determined torts outcomes were mediated during the litigation process. In these cases, mediation did not result in a settlement of the claim. It may have narrowed the trial issues and provided clarification to the participants about the nature of the legal arguments. Alternatively, for this small number of litigants (six in 2005/6) the cost of the litigation process may have increased.

The settlement data suggests that mediation has had some impact on settlement without unnecessarily replacing informal negotiation as the usual means of finalisation of litigated matters. Whether or not mediation has achieved the goal of causing consensual settlement to occur earlier in the litigation process is an important question that will now be considered.

6.2 Time efficiency

Timeliness of finalisation of litigation is a major policy objective and the performance of Australian courts is assessed against this criterion. The Productivity Commission's performance indicators are accepted as the primary indicators of the

³³⁹ Averaged from Table [5.1G].

Court's efficiency and effectiveness.³⁴⁰ There are two measures of timeliness: first, the time taken from the filing of a certificate of readiness to finalisation and secondly, the time taken from commencement of litigation to finalisation. The distinction between these two measures is that the former is more directly related to and influenced by court performance than the latter, which is largely influenced by the choices made by lawyers and parties to the litigation.

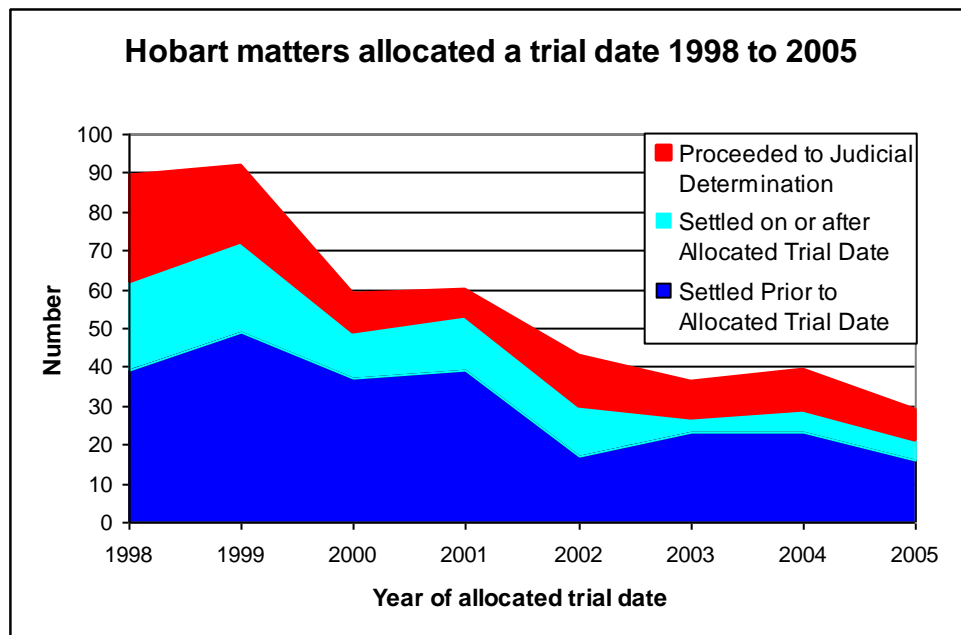
6.2.1 Waiting lists for trial

Case management and court-connected mediation have both enabled the Court to improve timeliness in terms of the waiting period between matters being declared ready for trial and available trial dates.³⁴¹ Performance has been improved by better diagnosis of whether matters are ready to be listed for trial and by disposing of cases at earlier stages, either before listing or before the date of trial. The main contribution that court-connected mediation has made in relation to efficiency is to clear the waiting lists for trial by encouraging earlier settlement of matters that would otherwise settle on the courthouse steps. The following Chart [6.2A] shows the declining number of matters listed for trial over time. The graph is stacked to portray the manner of finalisation of the matters that were allocated a trial date in Hobart between 1998 and 2005.³⁴²

³⁴⁰ Evidence to the House of Assembly Estimates Committee. Tasmania, *Estimates Committee B Hearing*, House of Assembly, Tuesday 6th June 2000, 54 (Ian Ritchard, Registrar of Supreme Court of Tasmania).

³⁴¹ Steering Committee for the Review of Government Service Provision (2007), above n11, [Box 6.9] 'Civil Timeliness Factors'.

³⁴² The data for this chart has been compiled from trial lists relating to the relevant periods that were provided to me by the Registry staff.

Chart 6.2A³⁴³

Source: Court database

The overall number of matters listed for trial has declined dramatically, with the largest reduction in the early years of formalisation-settling in³⁴⁴ of mediation at the Court. This decline has also occurred in the context of fewer actions being brought at the Court in recent years.³⁴⁵ Most matters that were allocated a trial date settled prior to, on or after the allocated trial date. The Chart illustrates the low number of matters in which a trial date was allocated that proceeded to judicial determination.

³⁴³ Ns as follows:

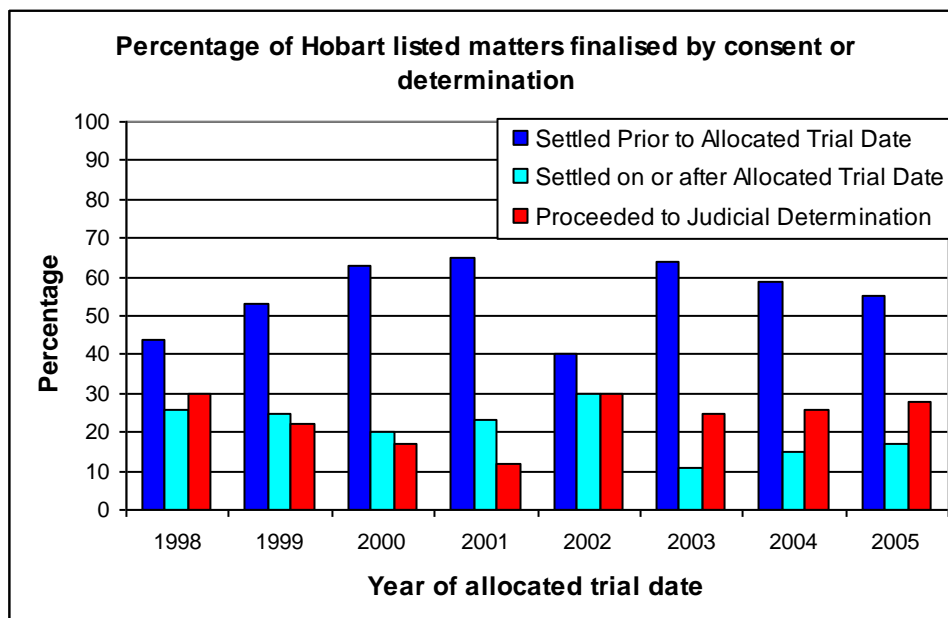
| | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 |
|------------------------|------|------|------|------|------|------|------|------|
| Listed | 89 | 92 | 59 | 60 | 43 | 36 | 39 | 29 |
| Settled Prior | 39 | 49 | 37 | 39 | 17 | 23 | 23 | 16 |
| Settled on or after TD | 23 | 23 | 12 | 14 | 13 | 4 | 6 | 5 |
| Proceeded to JD | 27 | 20 | 10 | 7 | 13 | 9 | 10 | 8 |

³⁴⁴ The three year periods analysed in this chapter are defined in [3.4.3] above and Chapter 3 [3].

³⁴⁵ See Table [6.3].

Despite the efforts of the Court to encourage earlier settlement of matters that are destined to settle, a small proportion of matters that were allocated a trial date proceeded to judicial determination. Most listed matters were settled prior to the allocated trial date, with more matters settling on the allocated date or after the commencement of the trial. Settlements on or after the allocated trial date are often referred to as settlements ‘on the courthouse steps.’ One of the primary institutional aims of court-connected mediation was to reduce the number of settlements on the courthouse steps. The number of such settlements has declined dramatically but the fall in the overall proportion of listed matters that settle on the courthouse steps is less dramatic. The following Chart [6.2B] presents information about the means of finalisation of listed matters as a percentage of the number of matters listed for trial:

Chart 6.2B³⁴⁶



Source: Court database

³⁴⁶ See n343 for Ns.

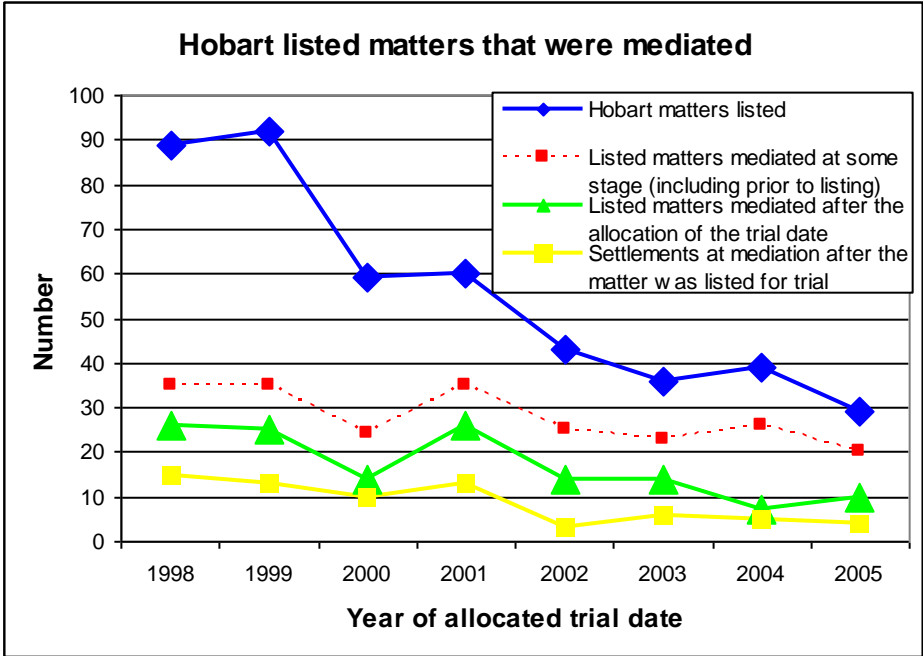
Chart [6.2B] shows that between 1998 and 2001 the proportion of listed matters that settled prior to the allocated trial date rose. There was a rise in litigation processing times in the 2002/2003 financial year, which indicates that there was a problem with delay during that period.³⁴⁷ This may explain the departure from the overall trend during that year. Since 2003, the proportion of listed matters that settle prior to the allocated trial date has declined. This coincides with rises in both the proportion of matters proceeding to judicial determination and the proportion of matters that settle either on or after the allocated trial date. After the *ADR Act* commenced, most mediations occurred before the allocation of a trial date in accordance with the Court's policy. Therefore, the reversal of the trend of declining proportions of listed matters proceeding to judicial determination may be the result of a more cautious approach to the allocation of trial dates. By requiring that higher proportions of litigants exhaust settlement negotiations before a trial date will be allocated, the Court has reduced the number of listings and a greater proportion of listed matters are destined for trial rather than pre-trial settlement. The recent rise in the number of matters settling on or after the allocated trial date may reflect an increasing willingness to continue negotiations during trial.

Mediation has probably influenced the trends in listing outlined in Charts [6.2A] and [6.2B] above, although it is difficult to determine the extent of that influence. The proportions of listed matters must be considered within the context of the significant reduction in the overall number of matters listed for trial. The Court has successfully reduced pressure on the trial lists by diverting matters to mediation prior to the allocation of a trial date.

³⁴⁷ See [6.2.2] below.

The following Chart [6.2C] outlines the numbers of listed matters that were mediated at some stage prior to finalisation. It also shows the number of matters that were mediated within three months of the allocated trial date. This figure represents those matters that were mediated after the trial date had been allocated.³⁴⁸

Chart 6.2C³⁴⁹



Source: Court database

³⁴⁸ The date that the trial date was allocated is not available. Therefore, it has been assumed that the time between the date of allocation and the trial date is up to three months. In more recent years the waiting lists for trial have been cleared and trial dates can be allocated with as little as six weeks notice.

³⁴⁹ Ns as follows:

| | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 |
|-----------------------------------|------|------|------|------|------|------|------|------|
| Hobart listed | 89 | 92 | 59 | 60 | 43 | 36 | 39 | 29 |
| Listed and mediated | 35 | 35 | 24 | 35 | 25 | 23 | 26 | 20 |
| Mediated after listing | 26 | 25 | 14 | 26 | 14 | 14 | 7 | 10 |
| Settled at mediation after listed | 15 | 13 | 10 | 13 | 3 | 6 | 5 | 4 |

The numbers of matters mediated after the allocation of a trial date have varied over time, but have fallen slightly over the relevant time period. There has also been a slight overall decline in the number of these matters that settle at mediation. The average settlement rate at mediation after listing for trial between 1998 and 2005 is 30%,³⁵⁰ which is lower than the overall settlement rate at mediation.³⁵¹ The number of listed matters that were mediated has fallen at a slower rate than the overall number of matters listed for trial. This means that matters that were listed became more likely over time to have been mediated at some stage of the litigation process. This is consistent with the Court's policy of referral to mediation. In Chart 3.4B it was demonstrated that over time, a greater percentage of the mediations that occurred in the Court's programme were held prior to the allocation of a trial date. An interesting observation, however, is the reasonably high incidence of listed matters being mediated after they were listed. Over the eight years, the average percentage of listed matters that were mediated after the allocation of the trial date was 31%.³⁵² Referral to mediation after listing for trial seems to contradict the informal policy of mediation being required before a trial date will be allocated. Some of the matters that were mediated after the allocation of a trial date were also mediated earlier in the litigation process. The Court's database was interrogated to determine how many 'late' mediations occurred in cases where a mediation had been held earlier in the litigation process. The numbers were found to be small. Of the Hobart matters that

³⁵⁰ The rates were: 1998 - 43%, 1999 - 37%, 2000 - 42%, 2001 - 37%, 2002 - 12%, 2003 - 26%, 2004 - 19% and 2005 - 20%.

³⁵¹ See Chart [6.1A] above which shows that the immediate settlement rates for the mediation programme as a whole ranged between 55% and 65%.

³⁵² Ns in note 349. Percentages were 1998 29%, 1999 27%, 2000 24%, 2001 43%, 2002 33%, 2003 39%, 2004 18%, 2005 34%.

were listed for trial and mediated at the stage ‘Set down for hearing’, an average of two per year had been mediated on a prior occasion.³⁵³

6.2.2 Litigation processing time

Timeliness can also be measured by the average time taken for a matter to proceed through the litigation process before being finalised. The time between commencement and finalisation is influenced by legal practitioner competence and tactics.³⁵⁴ Establishing a connection between timeliness by this measure and court performance is difficult because most matters are destined to settle during litigation. Such settlement often occurs without the direct involvement of a court, although the ‘shadow of the court’ may encourage settlement.

In 1999, the Productivity Commission commenced assessing timeliness by collating data about the elapsed time between the date of lodgement and finalisation.³⁵⁵ Courts are expected to manage matters effectively and to ensure they don’t get ‘lost’ or ‘abandoned’ in the system. Litigants should not be able to use delay tactics and should also be able to access pre-trial processes without unreasonable delay.

The Court’s performance in relation to the timeliness indicator described above is plotted in Chart [6.2D]. The following percentages of non-appeal civil matters in the

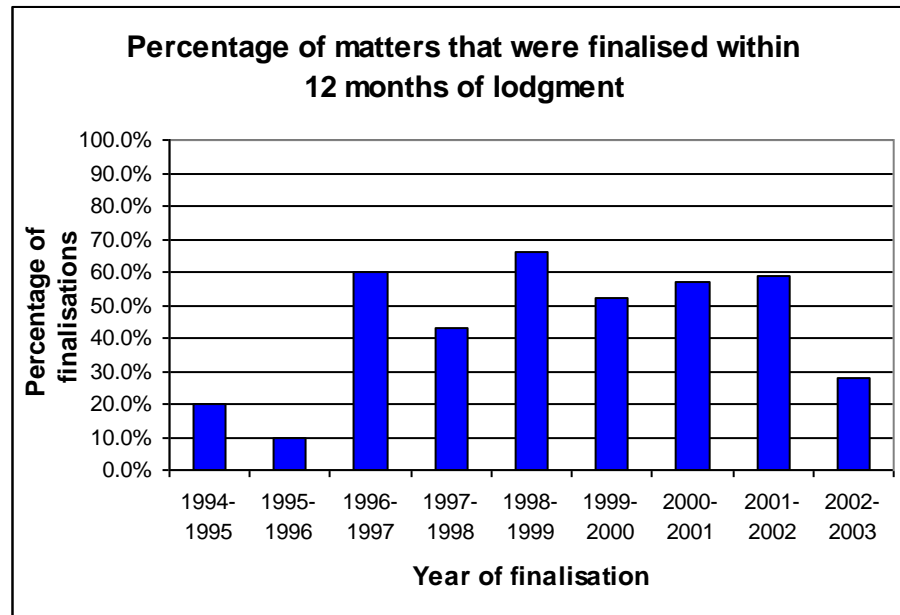
³⁵³ The numbers were 2 in 1998, 1 in 1999, 3 in 2000, 2 in 2001, 1 in 2002, 4 in 2003, 1 in 2004 and 3 in 2005.

³⁵⁴ Steering Committee for the Review of Government Service Provision (2007), above n11, Box 6.9 p6.27. Factors that may affect timeliness include the existence of related applications or issues requiring judgment, adjournments by the request of parties, case management, mediation and also inactive cases that have been effectively abandoned.

³⁵⁵ Steering Committee for the Review of Government Service Provision, ‘Report on Government Services 1999: Part D Justice’ (Australian Government Productivity Commission, 1999). Since 2004 the Productivity Commission has used a different measure of timeliness.

Supreme Court of Tasmania were finalised within twelve months of the date of lodgement.³⁵⁶

Chart 6.2D³⁵⁷



Source: Productivity Commission Reports, see n355

The Supreme Court of Tasmania has made some improvement in timeliness, but in 2002-2003 it had one of the longest finalisation times of all Australian Courts.³⁵⁸ The Chief Justice recorded in his 2002-2003 Annual Report that '[o]ur own statistics

³⁵⁶ Figures compiled from Productivity Commission Reports: Steering Committee for the Review of Government Service Provision (1999), above n270; Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2000: Part D Justice' (Australian Government Productivity Commission, 2000); Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2001: Part D Justice' (Australian Government Productivity Commission, 2001); Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2002: Part D Justice' (Australian Government Productivity Commission, 2002); Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2003: Part C Justice' (Australian Government Productivity Commission, 2003); and (2004), above n20.

³⁵⁷ The figures are reproduced from the Productivity Commission Reports. See above n356. Ns were not quoted in these sources. The percentages are: 1994/1995 20%; 1995/1996 10%; 1996/1997 60%; 1997/1998 43%; 1998/1999 66%; 1999/2000 52%; 2000/2001 57.2%; 2001/2002 59%; 2002/2003 27.8%.

³⁵⁸ Chief Justice Cox (2003), above n7, 7.

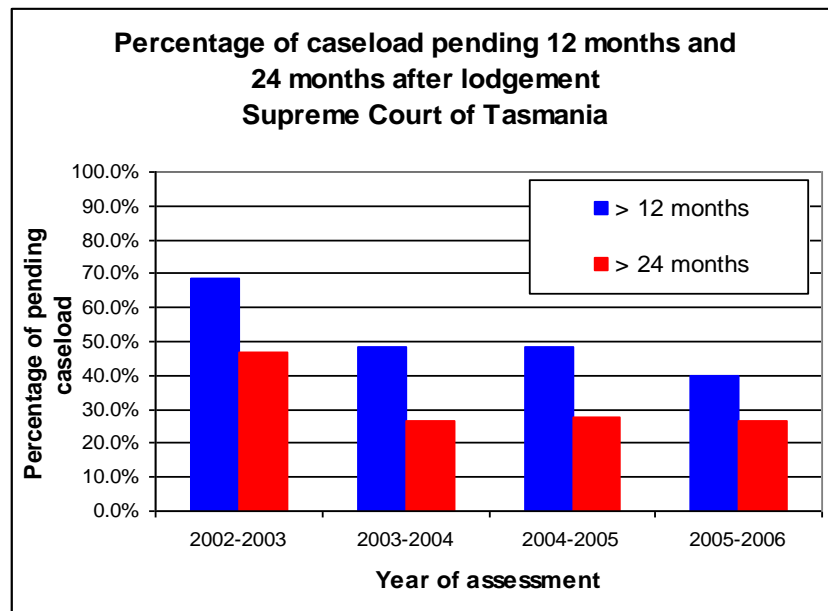
show that only 28% of all civil lodgments were finalised within six months of lodgment and 54% within eighteen months of lodgment.³⁵⁹

There are a number of factors that influence the Court's performance according to this measure of timeliness. The legal profession continues to influence the time taken to proceed through pre-trial procedures. But the limited extent of case management and the degree of enforcement of case management decisions also affect the control of the Court over this aspect of timeliness. Case management has been limited by the lack of an adequate computer system to support pro-active case management and this has frustrated attempts to improve efficiency within the Supreme Court of Tasmania. In 2004 the Court received funding to establish such a system. However, the system did not become operational until 2007. Once implemented it was expected to enable more effective judicial management and result in more efficient disposal times.

Since 2004 the Productivity Commission has measured timeliness by a backlog indicator which is the percentage of pending matters that remained pending a certain period after lodgement, rather than the earlier measure of the percentage of finalisations that occurred within a certain period from lodgement. The Court's performance by this measure is illustrated in the following chart:³⁶⁰

³⁵⁹ Chief Justice Cox (2003), above n7, 7.

³⁶⁰ Figures compiled from Productivity Commission Reports: Steering Committee for the Review of Government Service Provision (2004), above n20; Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2005: Part C Justice' (Australian Government Productivity Commission, 2005); Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2006: Part C Justice' (Australian Government Productivity Commission, 2006); and (2007), above n11.

Chart 6.2E³⁶¹

Source: Productivity Commission Reports, see n359

The national benchmarks for the backlog indicator in Supreme Courts are that ‘no more than 10 percent of lodgments pending completion are to be more than 12 months old [and] no lodgments pending completion are to be more than 24 months old.’³⁶² However, in practice these targets are not met. In 2005-2006 the Supreme Court of Tasmania’s backlog indicator for matters over twelve months old was 39.8%, which is close to the average of 36.6% in all Australian Supreme Court jurisdictions.³⁶³ However, 26.6% of pending civil matters during the same period were over two years old, comparing somewhat unfavourably with the Australian

³⁶¹ These figures have been reproduced from the Productivity Commission Reports. See above n356 & n360. Ns were not quoted in these sources. The relevant percentages were 2002/2003 >12months 68.4% >24months 47%; 2003/2004 >12months 48.5% >24months 26.8%; 2004/2005 >12months 48.4% >24months 27.7%; 2005/2006 >12months 39.8% >24months 26.6%.

³⁶² Steering Committee for the Review of Government Service Provision (2007), above n11, [Box 6.8], [6.25].

³⁶³ Steering Committee for the Review of Government Service Provision (2007), above n11, [Box 6.8], [6.25].

average of 19.7%.³⁶⁴ Nonetheless, the Chart shows that improvements have been made over time, despite the Court not meeting the benchmarks.

In summary, the increased use of mediation in the Court has probably made some contribution to the improved timeliness in the processing of actions. Increased efforts in case management have also contributed to improvements in timeliness.

6.2.3 Time efficiency for disputants

The focus of this part has been on the timeliness benefits to the Court, because information is available by which to measure such benefits. Disputants benefit from faster processing times of the Court's pending matters. They do not have to wait so long for trial. Furthermore, improved institutional efficiency may encourage parties to pay earlier attention to the settlement of a dispute.

Mediation has resulted in the earlier resolution of matters that would otherwise have settled later in the litigation process. It is fairly safe to presume that earlier settlement delivers savings in legal costs, because lawyers usually charge an hourly rate and the longer a case is pending the more time they are likely to spend attending to a matter.

6.3 Cost efficiency

It is difficult to determine an accurate measure of cost efficiency of a court-connected mediation programme.³⁶⁵ There are many variables which affect the cost

³⁶⁴ Steering Committee for the Review of Government Service Provision (2007), above n11, [Box 6.8], [6.25].

³⁶⁵ Tom Altobelli, 'The Cost Benefits of Alternative Dispute Resolution Revisited' (2004) 23(2) *The Arbitrator & Mediator* 23.

of litigation and furthermore there is no certainty as to what would have occurred if no mediation had taken place.

6.3.1 An additional step in the court process

Where court-connected mediation occurs and the matter nevertheless proceeds to trial it is possible that mediation has increased the costs that would otherwise have been incurred. If mediation succeeds in streamlining the litigation by clarifying the issues, it may still deliver cost savings overall. It appears that a minimal number of litigated matters fall into this category. In Hobart between 1 July 1999 and 30 June 2002, only fifteen of the tortious actions finalised by judicial determination were mediated, representing 9% of torts matters finalised by judicial determination.³⁶⁶ Between 1 July 2003 and 30 June 2006, twenty mediations occurred in matters finalised by determination, representing 26% of torts matters finalised in that manner.³⁶⁷ From 1999 to 2006, the average percentage of mediated matters that were followed by a determined outcome was 5%. Therefore, the proportion of torts matters that are unsuccessfully mediated prior to judicial determination has risen over time, however the proportion of mediated matters that proceed to judicial determination is low. For a small proportion of disputants, mediation has possibly increased their litigation costs. However, mediation may also have served the purpose of narrowing the issues and therefore delivered cost savings notwithstanding that the matter did not settle. Most mediations are followed by some sort of consensual settlement. Whether or not mediation saves costs in those cases is more difficult to establish.

³⁶⁶ See [Table 6.1E], [Table 6.1F] and [Table 6.1G].

³⁶⁷ See [Table 6.1E], [Table 6.1F] and [Table 6.1G].

6.3.2 Costs associated with court-connected mediation

There are a number of costs associated with court-connected mediation. First, the fee charged for accessing the mediation process. Until 2004 there was no charge for mediation conducted by a Court employee. There was a fee of \$300 charged for mediations conducted by external mediators, who were engaged from 2002.³⁶⁸ Since 28th July 2004 the Court has charged \$300 for the conduct of a mediation by Court employees and \$300 plus GST on behalf of external mediators conducting mediations in the court-connected programme.³⁶⁹ Parties usually bear the mediation fee in equal shares. This fee is minimal when compared to some rates for mediation outside the court system.³⁷⁰ Some of the mediation schemes in interstate Supreme Court jurisdictions leave the mediator's fee to the discretion of the mediator and market forces.³⁷¹ In Western Australia the mediators are court-employed and a fee is payable for their services.³⁷² In Victoria external mediators charge private market rates, but where court-employed mediators are used a small mediation fee is

³⁶⁸ Chief Justice Cox (2003), above n7, 9. '...the legal profession was offered the opportunity to undertake assisted dispute resolution at the Court, but under the guidance of mediators appointed and paid for by the parties.'

³⁶⁹ Supreme Court of Tasmania, 'Circular No 6/2004' (14 July 2004) and 'List of Filing Fees and Costs on Supreme Court Documents Effective from 28 July 2004' <www.courts.tas.gov.au/supreme/publications/filing_fees_costs.htm> (16th September 2004). The circular is no longer located on the website.

³⁷⁰ The Office of the Mediation Advisor states in relation to mediation in franchise disputes that 'on average, mediations cost each party approximately \$1400' <www.mediationadvisor.com.au/#cost> (13th February 2008). Three examples of private mediation rates illustrate the variation within the field. Jackie Curran, mediator of family, workplace and community disputes charges \$165 per hour with a minimum of four hours for each mediation (\$660). <www.mypage.tsn.cc/jackie/Costs.htm> (13th February 2008). Scott Ellis charges \$250 per hour or \$2000 per day plus GST for commercial mediation. <www.arbitrationmediation.com.au/rates.asp> (13th February 2008). Dominic Williams charges between \$1800 to \$3000 plus GST per day for commercial, workplace and family mediation. <www.donwilliams.com> (13th February 2008).

³⁷¹ For example, in the Supreme Court of Queensland the fee is negotiated with the mediator <www.courts.qld.gov.au/Factsheets/R_FS_AlternativeDisputeResolution.pdf> (13th February 2008). In the Supreme Court of South Australia the fee can be set by the mediator but cannot exceed the maximum contained in the Masters' Guide to Counsel Fees. Supreme Court of South Australia 'Practice Direction No 55 Court Referred Mediations' <www.courts.sa.gov.au/lawyers/practice_directions/civil_pd> (13th February 2008). In New South Wales, although there is no charge for Court-annexed mediators, private mediators are free to charge market rates <www.lawlink.nsw.gov.au/lawlink/Supreme_Court/11_sc.nsf> (13th February 2008).

³⁷² In Western Australia the Supreme Court (Fees) Regulations 2002 (WA) prescribe a fee of \$147 for individuals and \$221 for other litigants.

payable.³⁷³ Internationally, there are also a variety of practices. In the Central London County Court each party pays £100, in the Toronto Mandatory Mediation Programme there is a \$300 fee, in North Carolina courts the fee is negotiated directly with the mediator and in the Ohio Courts there is no charge.³⁷⁴ Disputants also incur the costs of their lawyer preparing for and attending mediation. Most legal practitioners charge on an hourly rate so the cost of mediation will vary depending on the amount of preparation in which legal practitioners engage, the degree of complexity of the case and the actual time taken to conduct the mediation. During the research legal practitioners expressed reluctance to reveal their hourly rate to the researcher.³⁷⁵ Therefore, I do not have information on which to assess the legal costs to disputants related to court-connected mediation.

The Court incurs the cost of employing the court-employed mediators or engaging the time of the registrar and deputy registrar, administrative costs of arranging mediations and capital costs of providing appropriate space for the mediations to occur.

6.3.3 Savings associated with court-connected mediation

It is more difficult to measure cost savings than additional costs, because although most matters are destined to settle prior to trial, there is no certainty as to the timing of that inevitable settlement, which will be a significant factor in measuring costs. For example, whether mediation is held before or after various pre-trial procedures

³⁷³ Sourdin (2009), above n5; The payment for court-employee mediators is \$60 per hour. Supreme Court (Fees) Regulations 2001(Vic) <www.dms.dpc.vic.gov.au> (13th February 2008).

³⁷⁴ Genn et al (2007), above n88; Relis (2009), above n79; Clarke et al (1995), above n88; Wissler (2001-2002), above n78.

³⁷⁵ A small number of telephone surveys were conducted in the early stages of the research and legal practitioners declined to respond to questions about their fees charged to clients.

have occurred will impact on costs. Matters are more likely to be mediated at earlier stages in proceedings in recent years than in the early years of formalisation-settling in.³⁷⁶ However, the immediate settlement rates have fallen slightly over the same period of time.³⁷⁷ Therefore it is difficult to conclude whether mediation has saved costs or not.

It is often claimed that mediation saves the costs of trial, however there is no clear evidence that mediation settles matters that were otherwise likely to proceed to trial. For example, if the proportion of matters that proceed to trial has reduced over time, then it may be concluded that court-connected mediation has saved some disputants the costs of a trial. The following Table [6.3] shows the numbers of Hobart torts matters filed and finalised by court determination for each financial year between 1996 and 2006. The ratio of court-determined torts finalisations to torts actions filed is also presented in the Table.

³⁷⁶ Chart [3.4A].

³⁷⁷ Chart [6.1A].

Table 6.3**Hobart torts: ratio of matters filed to matters finalised by court determination****1996 to 2006**

| Financial year | Number filed | Number finalised | Number finalised by court determination | Number filed for every finalisation | Number filed for every court determined finalisation |
|-----------------------|---------------------|-------------------------|--|--|---|
| 1996/1997 | 714 | 507 | 38 | 1.4 | 19 |
| 1997/1998 | 686 | 500 | 12 | 1.4 | 57 |
| 1998/1999 | 692 | 531 | 17 | 1.3 | 41 |
| 1999/2000 | 626 | 555 | 23 | 1.1 | 27 |
| 2000/2001 | 969 | 503 | 107 | 1.9 | 9 |
| 2001/2002 | 440 | 591 | 34 | 0.7 | 13 |
| 2002/2003 | 425 | 543 | 38 | 0.8 | 11 |
| 2003/2004 | 374 | 510 | 29 | 0.7 | 13 |
| 2004/2005 | 240 | 405 | 27 | 0.6 | 9 |
| 2005/2006 | 213 | 285 | 20 | 0.7 | 11 |

Source: Court database

This Table shows that during the years since mediation became formalised at the Court, there has been a shift in the number of court determinations for every torts matter filed. However, rather than demonstrating a fall in the proportion of matters that proceed to determination, it shows that a larger proportion of matters proceed to trial. This demonstrates the processing of the Court's backlog of cases. Since 2001/2002 the Court has finalised more torts matters than have been filed. This has released the pressure on the Court's time and shortened the time taken to process

litigation. Such time savings are likely to result in lower litigation costs for disputants.

However, even if more matters are settled at earlier stages in proceedings than in the past or a lesser proportion of matters proceed to trial, it is impossible to isolate the influence of mediation from the multitude of other changes. Those changes include the nature of the Court's caseload and its increasingly active case management practices.

6.3.4 Cost efficiency of mediation

In summary, there is no evidence that mediation has increased the costs of litigation for matters that are destined for trial. The mediation fee charged by the Court does not appear to be excessive compared to other mediation programmes. There is no conclusive evidence that mediation has delivered cost savings, although it probably has for those matters that settle at mediation early in the litigation process. There is no evidence to measure whether court-connected mediation is cheaper than lawyer negotiation in the Court.

7 Conclusion

This chapter has provided a detailed overview of the mediation programme at the Supreme Court of Tasmania. The Court has a presumptively mandatory mediation programme that has evolved since the mid-1990s and was formalised in the new millennium. Mediation is defined broadly in the legislation and no guidelines have been published regarding the conduct of the mediation programme. During the period of this study, most types of disputes were referred to mediation, although the

majority of cases were resolved without referral to mediation. Mediation usually occurred after many of the pre-trial procedures had been conducted. There were a small number of mediators who conducted mediations at the Court, three of whom were court-employees.

Referral to court-connected mediation is not fully consensual and was usually made late in the life of the dispute. Because of the high number of personal injuries claims mediated in the period relevant to this study, the participants were often agents of the individuals who are directly involved in the events giving rise to the dispute.

Between 55% and 65% of mediations resulted in an immediate settlement and an additional number settled within one month of mediation.³⁷⁸ More consensual finalisations occurred without mediation than with mediation.³⁷⁹ The Court has experienced improvements in time efficiency since court-connected mediation was adopted and the backlog of pending matters has been reduced. Cost savings attributable to mediation are not readily apparent.

In addition to the background programme characteristics that have been identified in this chapter, some findings confirmed a style of process that was quite removed from the core features of responsiveness, self-determination and cooperation. It did describe a process that accords with the hypotheses posed about mediation in the court-connected context. Namely, the focus is on legal issues at the expense of non-

³⁷⁸ Between 1999 and 2001 an additional 24% of mediated matters settled within one month of mediation, between 2002 and 2006 an additional 14% of mediated matters settled within this time period. [Chart 5.1D] above.

³⁷⁹ Between 1999 and 2006 an average of 72% of consensual Hobart finalisations occurred without reference to mediation. [Table 5.1G] above.

legal interests, lawyers rather than disputants are the main participants and competitive rather than cooperative approaches occur regularly.

Departure from responsiveness: Non-legal interests tend to be ignored

In terms of the mediation practice styles described in Chapter 2, mediation as practised at the Court more closely resembled the settlement and evaluative styles rather than the facilitative or transformative styles. This reflects the primary focus on settlement of the legal action as opposed to other benefits of mediation. Mediation practice in the Court did not necessarily focus on the individual needs or interests of the disputants. The style of mediation practised at the Court was reported to be focused on the compromise of the legal issues between the parties. The content tended to be determined by the legal practitioners and was predominantly the legally defined contentious issues. Non-legal issues were aired in some mediations, often within the private session.

This chapter has described programme-related factors that influence the focus on legal issues. These include the timing of mediation (usually after pleadings), the Court's priority of settlement, the legal background of mediators and the participation of legal experts in the mediation process. Lawyer interviewees' perspectives of the relevance of their clients' non-legal interests to the court-connected mediation process are explored in Chapter 5. These perspectives will contribute to the understanding of the extent to which disputants are offered an opportunity to express their non-legal interests in the Court's mediation programme.

Limited self-determination: Lawyers rather than disputants are the main participants

The case study has also confirmed that disputants did not often participate actively in court-connected mediation and lawyers tended to control the process. Direct communication between disputants was not actively encouraged. Instead, the focus was on legally defined areas of disagreement, lawyers usually communicated on behalf of their clients and the process was very lawyer driven.

Further insight into lawyers' perspectives of direct disputant participation is gained through the analysis of the lawyers' interview responses in Chapter 5. That discussion will provide further information about the extent to which disputants are extended an opportunity to participate in the Court's mediation programme.

Competitive negotiation: the reduced cooperative opportunity

The style of mediation reported by mediators and lawyers encouraged adversarial bargaining. The priority of settlement over other potential benefits of mediation encouraged a focus on speedy resolution. Distributive bargaining styles were reported to occur as was the adversarial presentation of legal arguments to the other party and the mediator. The cooperative opportunity of mediation at the Court is developed further in Chapter 5.

The style of mediation that is practised in the Court suggests that the overriding purposes being promoted are the achievement of justice and institutional efficiency. The satisfaction and transformation purposes are not promoted by the style of mediation practised in the Court. The context of court-connected mediation, which

includes its place in the civil justice system, the objectives of court programmes and characteristics of participants, influences the purposes that are promoted by its practice. Another powerful influence on the shaping of court-connected mediation is lawyers' perspectives. This chapter has provided a context from which the lawyers' responses in Chapter 5 can be analysed. Some programme features will be drawn upon in Chapter 6 to explain the tendencies that are observed.

Chapter 5

Lawyers' perspectives of court-connected mediation in the Supreme Court of Tasmania

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1 Introduction

This chapter builds on the general description of mediation in the Supreme Court of Tasmania that was conducted in Chapter 4. Here, a more specific focus is taken to complete the consideration of the second research question posed on page 1: 'What is happening within the Supreme Court of Tasmania's mediation programme?' In this chapter, the focus is the practices of the lawyers who represent litigants in the programme. The evidence of lawyers' practices in relation to court-connected mediation at the Court, obtained from interviews, is presented here.

Lawyers impact on the nature of court-connected mediation practice in their general legal practice, in their preparation for mediation and through their influence during the mediation process. Lawyers' attitudes and practices influence both their own behaviour and the approach of their clients to the mediation process. Lawyers provide advice about when mediation is appropriate, prepare their clients for mediation and usually attend court-connected mediation with their clients. The way in which lawyers perform all of these tasks impacts upon the degrees of responsiveness, self-determination and cooperation that are realised in the mediation process.

The way that lawyers prepare themselves and their clients for mediation sheds light upon the extent to which disputants are offered an opportunity to explore a range of their interests, to participate directly and to cooperate with the other party. Clients' expectations are affected by how their lawyers explain the mediation process. The kind of mediation representation that lawyers adopt has great influence on the degree of direct disputant participation that is encouraged. It was noted in Chapter 2 that

clients rarely participate directly in alternative processes such as trial or lawyer negotiation. The inclusion of clients in dispute resolution processes may therefore be unfamiliar to some lawyers. This chapter illuminates the practices of lawyers within the Court.

Other factors that impact upon the degree to which non-legal interests are considered, disputants participate directly and cooperative approaches are encouraged, are the roles played by the participants in the mediation process. Here, lawyers' perspectives of the appropriate roles of disputants, mediators and lawyers are analysed.

This chapter also presents evidence of lawyers' perspectives of the goals of court-connected mediation. Lawyers' understandings of the purposes that should be promoted through mediation shape their approaches to the process. The delivery of the key opportunities of responsiveness, self-determination and cooperation are affected by lawyers' perspectives of purpose. For example, if a lawyer believes that the purpose of the mediation process is to resolve litigation quickly and to avoid the expense of trial, he or she is likely to discourage the client from raising non-legal concerns, may not see the value in direct disputant participation and may prefer an adversarial positional bargaining style. Alternatively, if a lawyer believes that the purpose is to resolve the dispute in accordance with the law, she or he is likely to use the mediation process to exchange legal arguments, reality test with the client and may seek a legal opinion from the mediator to reinforce the lawyers' advice. Again, non-legal interests and disputant participation may not be prioritised.

Lawyers' perspectives of purpose also contextualise and explain why lawyers adopt particular approaches. This contributes to the third research question: 'Why is there a difference between the possibilities and the practice of court-connected mediation in Tasmania?' This research question is explicitly addressed in Chapter 6, which synthesises the observations made throughout this thesis.

The focus of the thesis is upon the qualitative information gathered from the lawyer interviews – general themes, specific views and contrasting opinions about matters that are central to mediation. As noted in Chapters 1 and 3, this study appears to be the first qualitative study of its kind in Australia. No quantitative analyses are presented here. However, descriptive statistics are reported; namely, the number and percentage of responses to interview questions. These are intended to contextualise the qualitative information and to provide some sense about the frequency of particular views held by the lawyers. It should be noted that many of the interview questions were answered by small numbers of the participating lawyers. Clearly, only tentative conclusions can be drawn about the degree to which these views are representative across Tasmania. Where appropriate, previous research findings are compared to the results of this research.

Here, the dispute resolution practice of lawyers in their general legal practice is first considered. Then the way that they prepare themselves and their clients for mediation is discussed. Lawyers' practices and expectations about the roles of disputants, mediators and legal practitioners in mediation are described. Finally, interview responses that indicated lawyer perspectives of the goals of mediation are analysed.

The conclusion summarises the findings related to each of the hypotheses and associated core feature of mediation.

2 General legal practice

2.1 General attitudes towards court-connected mediation

There was general agreement amongst the interviewees that the court-connected mediation process was a beneficial part of the litigation process and that an emphasis on the exploration of settlement was beneficial to the legal system, the legal profession and disputants. Some practitioners cited gains relating to more than one of these interest groups. For example:

Quicker resolution. Therefore better outcomes for the parties, less expense and in a flow on sense, less expense to the community, less pressure on court resources.¹

This comment reflected the overwhelmingly positive attitude towards the Court's mediation programme and the identification of benefits to a wide range of stakeholders resulting from the programme.²

The finding that Tasmanian lawyers view court-connected dispute resolution favourably is consistent with other Australian research findings.³ Participants in

¹ Lawyer 37. This comment was in response to the question 'What are we gaining by having so many cases go to mediation?'

² Only one out of the 42 interviewees expressed a negative attitude towards the Supreme Court of Tasmania's mediation programme. All other interviewees viewed the programme positively, even if they identified areas in which it could be improved.

³ Hobart Family Law Pathways Group, 'Identifying Family Lawyer's Perceptions of Primary Dispute Resolution (PDR): What Factors Precipitate or Inhibit Referrals to PDR Services in Community Organisations?' (2004); Carol Bartlett, 'Mediation in the Spring Offensive 1992' (1993) 67(4) *Law Institute Journal* 232; Rachael Field, 'The Use of Litigation and Mediation for the Resolution of Custody and Access Disputes: A Survey of Queensland Family Law Solicitors' (1996) 7 *Alternative Dispute Resolution Journal* 5; Nadja M Spegel, 'Queensland Lawyer Attitudes Towards Mediation - Implications for Training and Education' (1998) *National Law Review* 1 <www.lexisnexis.com.au/nlr/articles-files/mediate/article.pdf>; Archie Zariski, 'Lawyers

court-connected dispute resolution programmes overseas (both lawyers and litigants) are also generally supportive of them and view the programmes as worthwhile in general as well as valuable to their individual cases.⁴

There is some variation in attitudes towards dispute resolution between locations. Such variation was noted by some lawyers and dispute resolution practitioners in Saville-Smith and Fraser's research in New Zealand.⁵ Factors which may contribute to such variations include the local legal culture, systemic delays in access to trial, routine referral to dispute resolution, judicial support for dispute resolution and the existence of a trusted pool of dispute resolution practitioners.⁶ Some of these factors have been considered in Chapter 4, where it was noted that in the Supreme Court of Tasmania matters declared ready for trial are no longer subject to long delay, referral to mediation is a common pathway and the judiciary actively support court-connected mediation. Some further insight into the legal cultural practice of dispute resolution will be gained throughout the description of lawyer experiences in this chapter.

2.2 General approaches towards dispute resolution

During the interviews lawyers were asked questions relating to their general

and Dispute Resolution : What Do They Think and Know (And Think They Know)? - Finding Out Through Survey Research' (1997) 4(2) *Murdoch University Electronic Journal of Law* 1 <<http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html> (27 May 2004)>.

⁴ K Saville-Smith and R Fraser, 'Alternative Dispute Resolution: General Civil Cases' (Ministry of Justice, 2004) 44; Robert G Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans, 'Evaluation of the Ontario Mandatory Mediation Programme (Rule 24.1): Final Report - The First 23 Months' (Robert Hann and Associates Limited / Ontario Ministry of the Attorney General, 2001); James S Kakalik et al, 'Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act' (MR-800-ICJ, RAND, 1996).

⁵ Saville-Smith & Fraser, above n4, 17. See also Julie Macfarlane, 'Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) *University of Missouri Journal of Dispute Resolution* 244.

⁶ Saville-Smith & Fraser, above n4, 17.

approaches towards dispute resolution.⁷ This provided some insight into the prominence that dispute resolution plays within their legal practice. They were also asked to relate the difference that court-connected mediation at the Supreme Court of Tasmania had made to the way that they practise.

2.2.1 Advice regarding dispute resolution processes

Thirty four⁸ legal practitioners were asked 'How frequently do you advise your clients in relation to dispute resolution processes other than litigation?' This question sought an indication of the degree to which practitioners exercise their role as the 'gatekeepers' of dispute resolution by providing advice in relation to a range of dispute resolution mechanisms. Of the thirty four respondents that answered this question only fourteen (41%) of respondents to the question said that they 'always' provide this advice to their clients. Another ten (29%) reported that they 'usually' did so, with the remainder reporting that they 'sometimes' (N=7, 21%) or 'never' (N=3, 9%) provided advice in relation to dispute resolution processes other than litigation. These results, albeit based on a moderate sample size, reflect a mixed approach to the role of legal practitioners as dispute resolution gatekeepers. The responses also suggest that some lawyers view court-connected mediation as a part of the pre-trial litigation process rather than as a separate alternative to litigation.⁹ In other words,

⁷ Three questions inquired about advice to clients regarding dispute resolution in lawyers' general legal practice. These questions were 'How frequently do you advise your clients in relation to dispute resolution processes other than litigation?', 'How frequently do you attempt to resolve your client's disputes by negotiation (other than during a mediation process)?' and 'How frequently do you advise your clients to participate in mediation?' Not all interviewees were asked these questions. They were formulated after a number of interviews had been conducted. Other practitioners were not asked either because of time constraints or unintended omission.

⁸ Not all legal practitioners were asked all of the questions in the interview schedule. There were a number of reasons for these omissions. See further Chapter 3 [4.1].

⁹ Such a perception accords with the assimilative vision of court-connected mediation. See Dorothy J. Della Noce, Joseph P. Folger and James R. Antes, 'Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection' (2002-2003) 3 *Pepperdine Dispute Resolution Law Journal* 11.

some litigation lawyers consider that the only dispute resolution process they advise clients in relation to is litigation, and they see court-connected mediation as merely a part of that litigation process rather than a separate dispute resolution option. The view by lawyers that mediation is part of, rather than an alternative to, the litigation process was also observed by McAdoo and Hinshaw in their investigation into the Missouri Supreme Court's mediation programme.¹⁰ There, attorneys saw mediation as a litigation tool rather than a client oriented problem-solving process.¹¹

There is some research that suggests that Tasmanian lawyers are unclear about the features of and differences between counselling, conciliation and mediation.¹² This confusion may contribute to the mixed practice of advice giving in relation to non-litigation processes. If lawyers do not have a clear understanding about a range of dispute resolution processes they are unlikely to refer their clients to those processes proactively.

2.2.2 Attempts to resolve disputes by negotiation

Thirty-seven¹³ legal practitioners were asked, 'How frequently do you attempt to resolve your clients' disputes by negotiation (other than during a mediation process)?' The purpose of this question was to identify to what extent legal practitioners rely on court-connected mediation as an alternative to informal lawyer negotiation. Lawyer negotiation is a normal part of legal practice and resolves most

¹⁰ Bobbi McAdoo and Art Hinshaw, 'The Challenge of Institutionalising Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri' (2002) 67 *Missouri Law Review* 473.

¹¹ McAdoo and Hinshaw (2002), above n10, 530.

¹² Hobart Family Law Pathways Group, above n3.

¹³ Not all legal practitioners were asked all of the questions in the interview schedule. There were a number of reasons for these omissions. See further Chapter 3 [4.1].

litigated matters.¹⁴ Therefore it was expected that attempts would normally be made to resolve disputes consensually, often through lawyer negotiation.¹⁵ None of the respondents reported that they 'never' engaged in negotiation in relation to their clients' disputes. Of the thirty seven responses to this question, twenty three (62%) reported that they 'always' attempted to resolve their clients' disputes by negotiation outside the mediation process. Nine (24%) reported 'usually' attempting to resolve disputes by negotiation and five (14%) reported that they 'sometimes' did so. Therefore, most of the lawyers do not restrict their negotiation opportunities to those provided within the court-connected mediation setting. All of the thirty seven lawyers who responded to this question engaged in unassisted lawyer negotiation at least sometimes. This finding was consistent with the statistics from the Court which show that most litigation is still resolved without referral being made to mediation.¹⁶

2.2.3 Advice to mediate

Thirty six¹⁷ legal practitioners were asked, 'How frequently do you advise your clients to participate in mediation?' This question sought an indication as to whether or not clients are being encouraged to participate in mediation by their legal practitioners. Twenty six of the thirty six respondents to this question (72%) indicated that they 'always' advised their clients to participate in mediation, reflecting the widespread enthusiasm amongst the profession for the mediation

¹⁴ David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (2005) citing Civil Justice Research Centre 'The Costs of Civil Litigation', December 1993, reporting that approximately 80-90% of civil matters entering court lists are settled before hearing or judgment. See also Supreme Court of Tasmania statistics throughout Chapter 4, which demonstrate that most matters resolve by consent without mediation.

¹⁵ Roger E. Hartley, *Alternative Dispute Resolution in Civil Justice Systems*, American Legal Institutions (2002) 174; Craig A. McEwen, Nancy H. Rogers and Richard J. Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 *Minnesota Law Review* 1317, 1368.

¹⁶ Chapter 4 [6.1].

¹⁷ Not all legal practitioners were asked all of the questions in the interview schedule. There were a number of reasons for these omissions. See further Chapter 3 [4.1].

process. Another eight (22%) reported that they 'usually' advised their clients to participate, indicating that there would be some occasions when practitioners would be of the opinion that mediation was inappropriate. One practitioner 'sometimes' advises clients to participate and one 'never' does so. Neither of these practitioners opposed court-connected mediation. Their response instead reflected their view that mediation is a standard pre-trial process and therefore they perceived that referral is inevitable, which means they do not need to advise about whether or not to participate. Notwithstanding the sample size of thirty six responses to this question, the overwhelming indication was that lawyers do advise their clients about the mediation process as a dispute resolution option.

2.2.4 Differences between mediation and negotiation

A supplementary question that was asked of thirty eight¹⁸ practitioners provided more information about the distinction, from the perspective of lawyers, between negotiation within and outside of mediation. The practitioners were asked 'Is mediation as practised in the Supreme Court of Tasmania substantially different from unassisted lawyer negotiation?' This question aimed to reveal whether or not lawyers believe that the way mediation is practised at the Court provides a substantially different process from the process which settles the overwhelming majority of litigated matters. Twenty seven of the thirty eight respondents (71%) reported that court-connected mediation is substantially different from lawyer negotiation. Analysis of other comments made by these practitioners indicates a mixture of distinctions, including the presence of clients in mediation as opposed to lawyer negotiation, the efficiency of negotiations within mediation, the creation of optimism

¹⁸ Not all legal practitioners were asked all of the questions in the interview schedule. There were a number of reasons for these omissions. See further Chapter 3 [4.1].

about the chances of settlement, the compulsory nature of court-connected mediation and the availability of the mediator's opinion as characteristics which distinguished court-connected mediation from lawyer negotiation. For example:

Main advantage is the opportunity for clients to meet face to face.¹⁹

It gets the parties to consider whether or not the matter is capable of settling and if it does it obviously saves time getting to that point because you've actually got somebody who is driving that process.²⁰

I think that it has formalised the settlement process in that it's more, the mediations tend to for some reason have an aura about them as being a chance to settle.²¹

What the new system does is forces everybody to negotiate.²²

It involves an outside entity coming in and giving an apparently impartial view.²³

Lawyers in other studies have identified the following factors as some which distinguish mediation from lawyer negotiation:

- Mediation demands civility and a sense of decorum, because both the clients and mediator are present;²⁴
- Mediation is more efficient;²⁵
- Mediation is relatively formal;²⁶
- Mediation decreases communication problems;²⁷

¹⁹ Lawyer 4 regarding advantages of the mediation process.

²⁰ Lawyer 16 regarding advantages of the mediation process.

²¹ Lawyer 5 regarding the differences that mediation has made to practice.

²² Lawyer 29 regarding the differences that mediation has made to practice.

²³ Lawyer 27 regarding the differences that mediation has made to practice.

²⁴ McEwen, Rogers and Maiman (1995), above n15, 1369; Craig A. McEwen, Lynn Mather and Richard J. Maiman, 'Lawyers, Mediation, and the Management of Divorce Practice' (1994) 28(1) *Law & Society Review* 149, 160.

²⁵ McEwen, Rogers and Maiman (1995), above n15, 1379.

²⁶ McEwen, Mather and Maiman (1994), above n24, 160.

- Mediation increases cooperative behaviour;²⁸
- Mediation enhances client involvement and understanding;²⁹ and
- Mediation provides a settlement event, which stimulates preparation and a serious attempt at settlement.³⁰

These factors align with those that were identified by the sample of Tasmanian lawyers, discussed above.

2.3 Impact of court-connected mediation on litigation practice

All forty two interviewees were asked, 'What difference has mediation in the Supreme Court of Tasmania made to the way that you practise?' The purpose of this question was to ascertain whether or not court-connected mediation had caused changes in the nature of litigation practice. Six interviewees indicated that this question did not apply to them as they had not been in practice in Tasmania before mediation was practised at the Court.³¹ In the following analysis only the remaining thirty-six responses have been considered.

2.3.1 Little or no change

A small number of practitioners considered that there had been little or no change to the nature of their legal practice. Only four practitioners of the thirty six (11%)

²⁷ McEwen, Rogers and Maiman (1995), above n15, 1379; McEwen, Mather and Maiman (1994), above n24, 158.

²⁸ Keith Schildt, James J Alfini and Patricia Johnson, 'Major Civil Case Mediation Pilot Program: 17th Judicial Circuit of Illinois' (College of Law, Northern Illinois University, 1994), 25; McEwen, Mather and Maiman (1994), above n24, 160.

²⁹ McEwen, Rogers and Maiman (1995), above n15, 1379.

³⁰ Elizabeth Ellen Gordon, 'Why Attorneys Support Mandatory Mediation' (1999) 85 (5) *Judicature* 224, 227; Roselle Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal of Dispute Resolution* 641, 664; McEwen, Rogers and Maiman (1995), above n15, 1387; McEwen, Mather and Maiman (1994), above n23, 158; Hartley (2002), above n15, 194; Macfarlane (2002), above n5, 290.

³¹ Lawyers 10, 13, 23, 26, 28 and 30.

mentioned no change to the nature of legal practice³² and another seven practitioners (19%) stated that the changes that they mentioned were minor.³³ Of those who said that there had been no change, or only minor change, to the way that they practised, four stated that settlement had always been discussed,³⁴ two said that they prepare for trial anyway,³⁵ another two said that mediation is often close to trial³⁶ and another two said that mediation had always been available for those who wanted to mediate.³⁷ Other explanations were that you can still get a trial date if you don't want to mediate³⁸ and that most matters are still negotiated.³⁹ This group of less than one third of the practitioners (11 of 36 =31%) demonstrated through their responses that some lawyers have not seen a need to adapt their practices in response to the formalisation of court-connected mediation. Some lawyers remain focused on trial as the ultimate litigation event. These lawyers prepare for trial in every case, regardless of the reality that most litigation is resolved outside of the trial process.⁴⁰ For these lawyers, the formalisation of mediation has not changed their approach to the process significantly. Others expressed a view that they had always negotiated or sought mediation as a dispute resolution option, meaning that the formalisation of mediation had not affected the nature of their legal practice.

Minimal change to general litigation practice was also identified in Genn et al's study of mediation in the Central London Court,⁴¹ where parties can 'opt out' of

³² Lawyers 17, 19, 24 and 35.

³³ Lawyers 1, 5, 12, 14, 15, 27 and 37.

³⁴ Lawyers 5, 12, 27 and 37.

³⁵ Lawyers 19 and 24.

³⁶ Lawyers 5 and 14.

³⁷ Lawyers 17 and 35.

³⁸ Lawyer 15.

³⁹ Lawyer 1.

⁴⁰ See Chapter 4 [6.1.3].

⁴¹ Professor Dame Hazel Genn, Professor Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Grey, Dev Vencappa, 'Twisting arms: court referred and court linked mediation under

court-connected mediation and large numbers of solicitors chose to do this rather than engaging with the programme. In Gordon's study in North Carolina attorneys did not describe major changes in the ways they negotiate, in the way they handled cases, or in the business aspects of their practice, that could be attributed to mediation.⁴² Both of these findings accord with the responses of the small group of lawyers in this study, who reported either none or minimal change to the way that they practise.

2.3.2 Changes to litigation practice

Most of the thirty six legal practitioners who reported that they practised prior to the formalisation of court-connected mediation (N=32 , 89%) identified some change to the way that they practised. One such change was the provision of a structured opportunity to discuss the possibility of settlement.⁴³ This suggests that many lawyers may consider the opportunity to negotiate within the mediation context to be preferable to negotiation outside of that setting. One of the benefits is that the setting of a mediation date provides an incentive to prepare for serious negotiations on that date. The perceived differences between negotiation and mediation that were outlined above may illustrate the reasons behind the preference for mediation over negotiation.

Lawyers interviewed by McEwen, Rogers and Maiman described mediation largely

judicial pressure' (Faculty of Laws, University College London, University of Nottingham Business School, 2007).

⁴² Gordon (1999), above n30, 226.

⁴³ 13 lawyers (of 36 =36%) mentioned this in answer to the question about the difference that mediation has made to the way that they practise. Lawyers 2, 3, 5, 7, 11, 15, 18, 22, 27, 29, 32, 38 and 41.

as formalising and improving negotiation.⁴⁴ By contrast, two of the Tasmanian lawyers believed that court-connected mediation had decreased the incidence of negotiation outside the mediation process.⁴⁵ They were of the opinion that the decrease in lawyer negotiation was regrettable. For example:

There has been a decrease in lawyer negotiation. Practitioners don't pick up the phone because mediation is just part of the process, and that's when settlement is discussed.⁴⁶

This expression of regret aligns with the small groups of lawyers in Macfarlane and Hartley's studies who claimed that they did not 'need' mediation because they negotiated anyway.⁴⁷ Confident and competent lawyer negotiators may have less need for mediation than some of their colleagues. Some lawyers in Macfarlane's study also expressed concern that negotiation skills were being lost as lawyers became dependent upon mediators.⁴⁸

An opportunity to negotiate

One of the benefits of mediation is that by creating a formal negotiation opportunity, it can cause matters to settle earlier than they would otherwise have done. Ten practitioners (out of 36 =28%) stated that court-connected mediation has caused negotiation or settlement to occur earlier in the litigation process.⁴⁹ For example:

I think it probably produces an earlier focus on resolution and an earlier focus on getting your act together.⁵⁰

There seems to be a trend ... because of the *ADR Act* and because we now are in a situation

⁴⁴ McEwen, Rogers and Maiman (1995), above n15, 1373.

⁴⁵ Lawyers 3 and 29.

⁴⁶ Lawyer 3.

⁴⁷ Macfarlane (2002), above n5, 284; Hartley (2002), above n15, 195.

⁴⁸ Macfarlane (2002), above n5, 281.

⁴⁹ Lawyers 4, 11, 14, 18, 21, 25, 27, 31, 37 and 39.

⁵⁰ Lawyer 39.

where the Court will order a mediation before it goes to trial, parties know that inevitably they have to go to a mediation. So we start looking at settlement options even before that point. So offers of compromise or just informal offers by letter seem to be occurring a lot earlier, or if they're not earlier, they're occurring at least prior to a mediation and there's a good chance of settling it that way and we don't even end up to a mediation. Sometimes you can actually settle something the day of the mediation, because the parties want to avoid a mediation. It's almost like, before it used to be the trial and people would want to avoid the trial and would have a last minute mediation, whereas now it has sort of been replaced by people wanting to avoid the preparation cost of a mediation. Also the inconvenience.⁵¹

Earlier attention to case evaluation and settlement

The consequences of earlier negotiation included that lawyers define the details of their clients' cases earlier than they would otherwise have done.⁵² This finding is consistent with reports by lawyers in other studies that court-connected mediation has caused them to negotiate earlier in the litigation process than they would otherwise have done. Divorce lawyers in Maine reported that the setting of a mediation date prompts case preparation and serious involvement in negotiations.⁵³ Consequently, settlement tends to occur earlier than it otherwise would.⁵⁴ In the Minnesota Supreme Court, lawyers reported that they tended to complete litigation tasks such as discovery and interrogatories sooner in preparation for mediation.⁵⁵ Some Canadian lawyers interviewed by Macfarlane reported that early mandatory mediation had altered their expectations that serious settlement discussions could not take place until discovery had occurred.⁵⁶ Furthermore, some lawyers reported that

⁵¹ Lawyer 31.

⁵² Lawyers 2, 14, 20, 25 and 33.

⁵³ McEwen, Rogers and Maiman (1995), above n15, 1387.

⁵⁴ McEwen, Rogers and Maiman (1995), above n15, 1387.

⁵⁵ Bobbi McAdoo, 'A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota' (2002) 25 (3) *Hamline Law Review* 401, 433.

⁵⁶ Macfarlane (2002), above n5, 291.

they planned for settlement discussions before mediation in order to avoid mediation much as they would have once avoided a trial.⁵⁷ Lawyers interviewed by Macfarlane also reported that more files settle faster, which means that they have fewer, but more active, files at any one time.⁵⁸

Earlier attention to settlement has also created some shift of focus from trial to settlement for some lawyers. Nine practitioners (of 36 =25%) mentioned that the focus of litigation had changed from trial to settlement or mediation.⁵⁹ For example:

Oh I think it's made an enormous difference. I think the whole culture of conducting dispute resolution has changed. I've been in practice now for seventeen years and at the beginning it really was the exception rather than the rule. Whereas now it's almost, certainly in the Supreme Court jurisdiction and in all the tribunal jurisdictions it's ubiquitous, I mean, there is no option. So it is a process that is always gone through whether or not the matter ultimately ends up in court. ... It's probably changed peoples' thinking too. I think it you're thinking in terms of a negotiated outcome rather than a litigated outcome then it alters the way you approach the task to some degree...⁶⁰

I think the most important thing is that because the mediation process is there, you're not focusing on a trial as being necessarily the end result as in where it's going to go. Often you actually expect and most of my MAIB files resolve at mediation. The end result is, I mean you still prepare a case with a trial in mind but you've now got a level where it's actually most likely to resolve at that level.⁶¹

McEwen, Mather and Maiman also identified some evidence of a shift from a focus

⁵⁷ Macfarlane (2002), above n5, 290.

⁵⁸ Macfarlane (2002), above n5, 290.

⁵⁹ Lawyers 9, 11, 14, 18, 21, 33, 34, 36 and 42.

⁶⁰ Lawyer 21.

⁶¹ Lawyer 9.

on trial and adversariness toward settlement and cooperation.⁶² For some of Macfarlane's lawyers files needed much earlier research and assessment after court-connected mediation was adopted.⁶³ Court-connected mediation has provided some incentive for lawyers to manage their cases more proactively and to anticipate and initiate settlement discussions.

Breakdown of adversarial approaches

Three lawyers (of 36) reported that court-connected mediation has forced a breakdown of adversarial approaches in litigation.⁶⁴ Although this is a small number, the comments are pertinent to the question of cooperation in court-connected mediation that is examined in this thesis. The comments align with some made in other research. Reports from lawyers in other studies about changes to adversarial approaches include the following:

- Increased interest in the interests and perspectives of the other party and willingness to cooperate;⁶⁵
- Increased emphasis on explicit development of strategy for resolution;⁶⁶
- Stronger and better relationships with other lawyers;⁶⁷
- Decreased aggression, hostility or other adversarial approaches;⁶⁸

There appears to have been some shift toward cooperation in response to the availability of mediation at the Court. An important qualifying factor is that cooperation has always been available to lawyers in their negotiations and has

⁶² McEwen, Mather and Maiman (1994), above n23, 177-178.

⁶³ Macfarlane (2002), above n5, 261.

⁶⁴ Lawyers 6, 11 and 25.

⁶⁵ Macfarlane (2002), above n5, 297; McEwen, Rogers and Maiman (1995), above n15, 1385; Wissler (2002), above n30, 687.

⁶⁶ Macfarlane (2002), above n5, 298.

⁶⁷ Macfarlane (2002), above n5, 298.

⁶⁸ McEwen, Rogers and Maiman (1995), above n15, 1368; McEwen, Mather and Maiman (1994), above n23, 161..

contributed to the resolution of most litigation. Furthermore, competitive approaches persist from some lawyers.⁶⁹ The disjunct between preferences for cooperative or adversarial approaches amongst lawyers working within a programme is one of the difficulties that is particularly relevant to a compulsory mediation programme, where parties are not necessarily committed to the cooperative opportunity of the mediation process.

Other impacts on litigation practice

One lawyer (of 36) reported that mediation had required him to develop new skills.⁷⁰ This single comment should be read together with the responses to the question about skills required for mediation, which were explored in Chapter 4.⁷¹ There it was revealed that mediation and trial experience are considered to be particularly valuable preparations for effective mediation practice. Presumably, such experience entails the development of new mediation-specific skills. Furthermore, insight may also be gained from other research. Macfarlane found mixed results amongst commercial lawyers in Toronto and Ottawa in relation to skills required for mediation. Some lawyers reported fundamental changes to their skills base, whilst others reported that no new skills were required other than instrumental skills such as appearing friendly and helpful.⁷² A similar variety of opinion was expressed by the Tasmanian lawyers (see for example the discussion of lawyer views of mediation and trial experience in Chapter 4 [4.3.3]).

⁶⁹ Julie Macfarlane and Michaela Keet, 'Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program' (2005) 42 (3) *Alberta Law Review* 677, 689-692; see also discussion within this chapter.

⁷⁰ Lawyer 40.

⁷¹ Chapter 4 [4.3.3].

⁷² Macfarlane (2002), above n5, 296.

One lawyer (of 36) thought that court-connected mediation requires lawyers to give broader advice to their clients, in terms of a thorough analysis of both sides of a case:

It does require you to have – to give a lot broader advice than you would otherwise give. In other words you have to spend more time looking at potential weaknesses in your client's case so that you can advise them on a proper range to settle than you would ordinarily do, and you have to take into account claims or issues that really you might consider completely irrelevant in that they're not going to have any reasonable prospect of success, but nevertheless have to be taken into account.⁷³

This comment, although made by only one lawyer, is interesting because it suggests that in negotiations outside mediation, there is less attention paid to the intricacies of the legal cases than within the mediation context. It may be that negotiations sometimes proceed in terms of incremental monetary offers with minimal reference to the law. That style of negotiation was observed to be practised within the mediation programme at the Court, generally together with adversarial legal argument.⁷⁴

There were some negative changes that were identified. These included a decreased amount of court experience for lawyers,⁷⁵ the imposition of an additional step in the litigation process⁷⁶ and the disadvantage of having to justify offers and therefore reveal one's hand rather than making offers of plain figures without explanation.⁷⁷

2.4 Court-connected mediation and general legal practice

It is clear from the interview results that the majority of lawyers consider that court-

⁷³ Lawyer 16.

⁷⁴ Chapter 4 [5.5].

⁷⁵ Lawyers 1, 3, 14, 22, 25, 32 and 40. This concern was also identified in Macfarlane's study. See Macfarlane (2002), above n5, 281.

⁷⁶ Lawyer 4.

⁷⁷ Lawyer 33.

connected mediation has changed the way that litigation is practised by the legal profession. The changes that were identified were predominantly positive improvements in that way that litigation is conducted, being the encouragement of more frequent and earlier negotiation between lawyers, either within or outside court-connected mediation. Such changes indicate that the practices of many litigation lawyers have become more efficient as a result of the mediation programme. Other lawyers either considered that their practice was already efficient and needed no change or remained focused on preparation for the trial event. The responses demonstrate a diversity of adaptive responses to the mediation programme.

In their general practice, Tasmanian lawyers have a mixed approach to their role as dispute resolution gatekeepers. Less than one half always advise their clients in relation to dispute resolution options other than litigation. However, most legal practitioners always attempt to negotiate a resolution of their clients' disputes. Most lawyers (N=27 of 38, 71%) consider that court-connected mediation is substantially different from lawyer negotiation and a similar proportion (N=26 of 36, 72%) 'always' advise their clients to participate in court-connected mediation. Court-connected mediation has made some change to the way that 32 out of 36 legal practitioners practise (89% of those who practised prior to formalisation of court-connected mediation). It has provided an opportunity to discuss settlement, has caused negotiation to occur earlier in the litigation process and for some has changed the focus of litigation from trial to mediation.

The responses about general legal practice show that mediation has provided an opportunity for lawyers to pursue consensual outcomes earlier and more proactively.

3 Preparation for mediation

Lawyers should, prior to mediation, prepare both themselves and their clients to participate.⁷⁸ The degree and nature of preparation for mediation varies depending upon the nature, context and purpose of the mediation. It will also depend upon the participants and their interpersonal relationships. There are, however, some fundamental considerations that would be expected in preparation for negotiation and mediation. Interviewees were asked an open question 'How do you prepare yourself and your clients for mediation?' as well as two checklist questions, one relating to their own preparation for mediation and another relating to their preparation of their clients for mediation. Lawyers' own preparation is considered first.

3.1 Preparation of themselves

3.1.1 Checklist responses

Thirty-nine practitioners⁷⁹ were asked to indicate which of the following matters they typically did for themselves in preparation for mediation:

- Review the file
- Consider options for settlement
- Consider strategies
- Reflect on the personality of the opposing legal practitioner
- Find out who the mediator is

⁷⁸ Bridget Sordo, 'The Lawyer's Role in Mediation' (1996) 7 *Australian Dispute Resolution Journal* 20, 22-23; Law Council of Australia *Guidelines for Lawyers in Mediations* (LCA, 2007); Law Society of New South Wales, *Mediation and Evaluation Information Kit (Revised)* (2007) <www.lawsociety.com.au> at 24th January 2008; Chiara-Marisa Caputo, 'Lawyers' participation in mediation' (2007) 18 *Australasian Dispute Resolution Journal* 84.

⁷⁹ Not all legal practitioners were asked all of the questions in the interview schedule. There were a number of reasons for these omissions. See further Chapter 3 [4.1].

- Consider the needs of the parties

It was expected that a thoroughly prepared lawyer would probably consider all of these matters in preparing themselves for mediation.⁸⁰

This expectation was partly based upon other research, which has provided some insight into the ways that lawyers prepare themselves for mediation. Lawyers working in the Minnesota Supreme Court reported that they prefer to be thoroughly prepared for mediation (including full discovery).⁸¹ Macfarlane's investigation into lawyers working in Toronto and Ottawa found varied practices, although most lawyers prepared by conducting a case analysis.⁸² Macfarlane identified five 'ideal types' from her lawyer data, including the 'pragmatist', 'true believer', 'instrumentalist', 'dismitter' and 'opponentist'. These models reflected particular attitudes towards the court-connected mediation process. Lawyers tended to display characteristics of several ideal types rather than adhering to one model. Lawyers who displayed characteristics of 'dismissers' or 'pragmatists' sometimes undertook no preparation because they believed that settlement was not a realistic possibility.⁸³ Gerschman found that eight out of the ten lawyers he interviewed would not plan negotiation strategies before mediation.⁸⁴ A common theme in other studies is complaint about inadequate preparation by some lawyers for the mediation process. For example, mediators operating in the Central London Court reported lack of preparedness and 'going through the motions' as a particular unhelpful approach to

⁸⁰ John W Cooley, *Mediation Advocacy* (2nd ed, 2002) Ch 3; Bruce A. Blitman, 'Ten Ingredients for a Successful Mediation' (2003) 18(6) *Commercial Law Bulletin* 8.

⁸¹ McAdoo (2002), above n55, 432.

⁸² Macfarlane (2002), above n5, 262.

⁸³ Macfarlane (2002), above n5, 262.

⁸⁴ Joel Gerschman, 'Pilot Study Examines Lawyer's Roles in VCAT Mediations' (2003) 7 *VCAT Mediation Newsletter* 7, 9.

mediation.⁸⁵ Similarly, mediators in the Judicial Circuit of Illinois reported that one of the biggest stumbling blocks was when an attorney was ill-prepared or lacked the knowledge to fully assess the value of the case.⁸⁶ Lack of information was also cited as problematic by lawyers interviewed in Saskatchewan, who expressed concern about available information not being exchanged prior to mediation.⁸⁷ Thirty-nine percent of Maine lawyers reported that their colleagues were well prepared for mediation only 'sometimes' or 'rarely'.⁸⁸ There is therefore variation in the approaches that lawyers take to preparation for mediation and these differences are a source of tension within the legal profession.

The responses by Tasmanian lawyers were very mixed. Of the thirty nine practitioners who responded to this question, eight (21%) reported that they typically considered all of the items on the checklist. Seven (18%) reported that they considered all except 'consider the needs of the parties.' Another seven (18%) reported that they did all except 'find out who the mediator' is and 'consider the needs of the parties.' Six practitioners (15%) considered all of the matters on the check list except for finding out the identity of the mediator. One practitioner selected all but 'review file', another one selected all but 'consider options for settlement', another one selected all but 'consider strategies' and another practitioner selected all but 'reflect on the personality of the opposing legal practitioner.' One practitioner did not reflect on the personality of the opposing legal practitioner or find out who the mediator is, but considered all of the other matters. At the other extreme there was one practitioner who reported that he only considered options for

⁸⁵ Genn et al (2007), above n41, 124.

⁸⁶ Schildt, Alfini and Johnson (1994), above n28, 32.

⁸⁷ Macfarlane and Keet (2005), above n69, 689.

⁸⁸ McEwen, Mather and Maiman (1994), above n23, 159.

settlement and reflected on the personality of the opposing legal practitioner. These results, albeit based upon a sample size of only thirty-nine, nonetheless demonstrate that the preparation activities of legal practitioners vary considerably.

If each item on the list is considered separately, the responses indicated that 95% (N=37) of legal practitioners review the file before attending mediation, 90% (N=35) consider options for settlement, 92% (N=36) consider strategies for the mediation, 92% (N=36) reflect on the personality of the opposing legal practitioner, 54% (N=21) find out who the mediator is and 56% (N=22) consider the needs of the parties. The moderate sample size of thirty nine moderates the significance of these percentage figures, which are used here for descriptive purposes only. Nonetheless, the high proportion of positive responses to most of the items on the checklist demonstrates a clear trend in preparation for mediation and the disparity of responses to the other two items demonstrates a diversity of approaches.

3.1.2 Comparable to trial preparation

Overall, a thorough understanding of the legal case, consideration of options and development of strategies for mediation are considered to be important preparation tasks. Most practitioners review the entire case, update their evaluation of the case, analyse the strengths and weaknesses of the legal arguments and consider the likely outcome if the matter proceeded to trial.⁸⁹ Some practitioners reported that they usually prepare for mediation in the same way that they prepare for trial, although some do not prepare witness proofs and none prepare their cross-examination prior to

⁸⁹ This is consistent with the preparation for mediation recommended in literature. See for example Richard G Spier, 'Mediation Miscues: The 10 Biggest Mistakes Lawyers Make in Mediation' (1999) 59 *The Oregon State Bar Bulletin* 35, 36; Leonard L Riskin, 'Mediation and Lawyers' (1982) 43 *Ohio State Law Journal* 29, 37.

mediation. Some examples of the comments made about preparation of themselves for mediation are:

I'll go through the pleadings and make sure where possible that we're in a position to prove what we allege or defend what is alleged against us. Go through documents as to quantum, whether they be medical reports, whether they be contractual documents and the like. And then I will always either handwrite or dictate some submissions if you like, that I'll use as my opening in the mediation. 'This is our case, this is why we are going to win, this is why you should make a decent offer to settle the matter.'⁹⁰

By having very detailed particulars, I think just knowing precisely the values of all the heads of damage that you're seeking in terms of quantum and also being really prepared on the question of liability and to know the holes in the other person's case. So I think you have to have marshalled all the same information that you would have to have if you went to court, albeit that you don't necessarily have to have witnesses briefed, but you have to know what they're likely to say, in order to know what the strengths and weaknesses in your case are.⁹¹

Both of these comments suggest that some lawyers prepare submissions for mediation as if they are preparing for trial. The purpose of submissions in the courtroom is to persuade the judge or jury that the legal arguments presented on the clients' behalf should be accepted. It appears that many lawyers try to persuade the other participants to accept their legal arguments in mediation in much the same way as they approach the persuasion of a judge.⁹² By making submissions, the lawyers attempt to convince the other party that 'I'm right, you're wrong.' This can be contrasted with the cooperative problem-solving approach to negotiation, where participants share information and the emphasis is on them listening to one another

⁹⁰ Lawyer 13.

⁹¹ Lawyer 21.

⁹² This finding is consistent with the approach recommended in some literature promoting 'mediation advocacy'. See for example Beth Byster Corvino and Irving B. Levinson, '101 Ways to Wage Effective Mediation of Corporate Disputes' (1999) *Corporate Legal Times* 86.

more than stating their own positions and challenging the other about the accuracy of their view. There is an acknowledgment in cooperative problem solving that perceptions may vary and rather than one perception being 'right' and the other 'wrong,' an objective 'truth' is not assumed. By contrast, the formal legal system assumes that there is an objective truth. The role of a judge is to prefer one argument over another and to declare which perception is 'right.' Some lawyers may not have shifted their legal perspective of conflict in the context of mediation. This may explain the tendency to make addresses in mediation as would be done in court. The consequences include an exclusive focus on legal arguments and adversarial rather than cooperative approaches.

3.1.3 Options and strategies

Lawyers were also asked whether or not they consider options for settlement and their strategies for the mediation. An overwhelming majority (N=35 of 39, 90% and N=36 of 39, 92%) of interviewees do consider these matters. This is consistent with literature that suggests that superior negotiators consider multiple options, examine and identify common ground, consider the long term consequence of different issues, set ranges as goals rather than being specific and are flexible in relation to procedure.⁹³

3.1.4 Identity of other participants

Another consideration is the personality of the opposing legal practitioner. This was also considered to be a relevant preparation task by the overwhelming majority (N=36 of 39, 92%) of interviewees, which means that the negotiation style of that

⁹³ Pat Cavanagh, 'Doing it better - behaviour indicia of superior negotiators' (2002) 4(10) *ADR Bulletin* 141.

practitioner is likely to be considered. Consideration of the personality and approach of other legal practitioners is an important factor in negotiation planning.⁹⁴ One practitioner noted that it is sometimes necessary to qualify advice to a client about the potential benefits of mediation because of the personality of the opposing legal practitioner:

And of course when you know that type of practitioner is on the other side you have to say to your client, who is looking forward to this practical option to stop going to court - well there's a bit of a caveat on that Mrs Smith because we've got a so and so on the other side who is not going to approach it in the right manner.⁹⁵

This comment demonstrates that some personalities may demonstrate a non-cooperative attitude towards the mediation process and this is perceived by some other lawyers to inhibit the client's aim.

Twenty one of the thirty nine interviewees who responded to these questions (54%) do not find out who the mediator is prior to mediation, which suggests that they may not consider that the individual mediator's style is something worthy of considering prior to the mediation. The possible explanations include that the mediators may have similar styles and therefore there is an element of homogeneity (although variation was reported by mediators in Chapter 4), that some practitioners have only experienced one of the Court's mediators or that the lawyers do not consider that the mediator's role is significant. It is unclear which of these possible explanations applies, if any. By contrast, just under one half (N=18 of 39, 46%) of the interviewees do typically find out who the mediator is. The mix of responses and lack of clarifying remarks makes it difficult to draw conclusions from these results.

⁹⁴ Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1984) 31 *UCLA Law Review* 754, 837.

⁹⁵ Lawyer 32.

3.1.5 Non-legal interests of the parties

There was a similar division amongst the practitioners in relation to consideration of the needs of the parties. Many lawyers asked me during interviews 'what do you mean by needs of the parties?' This response reflects the awkwardness of the particular question from the perspective of legal practitioners, who are not accustomed to this terminology.⁹⁶ My response to this question was to explain that I meant the client's individual needs, which are often broader than their strict legal entitlements.

On the one hand, seventeen of the thirty nine lawyers who responded to this question (44%) reported that they do not consider the needs of the parties in preparing themselves for mediation. There were some comments made about the irrelevance of the non-legal needs of the parties to court-connected mediation. For example:

In the litigious process you want to win. You're clients' needs, well I don't know what you mean, is it food on the table or what?⁹⁷

With large clients it's not a personal matter, it's just a matter of where settlement will end up.⁹⁸

This group of views demonstrates how some lawyers' perspectives reinforce the exclusive focus on legal issues in court-connected mediation, at the expense of the core mediation feature of responsiveness, which requires inquiry about the individual needs and preferences of the disputants.

⁹⁶ A useful observation for future question design.

⁹⁷ Lawyer 7.

⁹⁸ Lawyer 16.

On the other hand, the remaining twenty two (of 39 =56%) of the practitioners reported that they do consider a range of needs of the parties in their preparation for mediation, which means that for those practitioners their client's needs or the needs of the other client are a relevant consideration. Some of these lawyers think outside the legalistic world view of rights and responsibilities and take a more comprehensive approach to their service to their client and dispute resolution. For example:

...you need to be considering the needs of your client. I suppose you don't really need to consider the needs of the other side, although if you can latch onto what they are then that gives you an advantage in the negotiation process.⁹⁹

The final part of this comment demonstrates that although the lawyer was interested in providing good service to their client, they would also take the needs of the other disputant into account for the purpose of planning the negotiation to pursue their own client's interests. The following lawyer considers the needs of the plaintiff on the other side because it is important to treat them with respect and dignity.

...one of the things I can in personal injuries litigation, particularly when acting for a defendant, is to keep in mind that on the other side there is a human being under a great deal of stress and for me it is another file, for them it is their life. So I think it is important to keep that in perspective and to I think to treat them with that respect. I think it is also important from the point of view too if you are trying to achieve a settlement, on many occasions to bring a human and sometimes compassionate face to what they might see as the bastard insurer defendants' lawyers who are just trying to save money (which we are)...¹⁰⁰

This lawyer went on to comment that accommodating the needs of a plaintiff on the other side of a mediation dispute might include calling them by their first or surnames according to their preference or where a plaintiff is injured, to accommodate their need for extended breaks during the mediation. This second

⁹⁹ Lawyer 13.

¹⁰⁰ Lawyer 41.

group of responses demonstrates that many lawyers are attune to the non-legal elements of disputes, including personal injuries and insurance claims, and these lawyers actively consider the non-legal elements in negotiation planning.

The split between the lawyers as to whether or not they consider the needs of the parties in their own preparation for mediation demonstrates two contrasting perspectives of the relevant considerations in mediation. Those lawyers who do not consider 'needs' of the parties demonstrated a preference for a narrow problem-definition, whereas many of those who do consider those 'needs' adopt a broader view of the problem.

3.1.6 Lawyers' preparation of themselves

On the whole, there were very mixed statements made by lawyers in relation to their consideration of the needs of the disputants in their own preparation for mediation. A client-centred lawyer would always maintain mindfulness about their clients' needs in a holistic rather than limited legal sense. In order to provide advice in relation to the appropriate dispute resolution process for a client, what the client wants is a paramount consideration. The capacity for court-connected mediation to achieve what the client wants should be considered. The interview responses demonstrate that close to one half of lawyers do not consider these issues in their preparation for mediation. This contrasts with the remainder of lawyers, who do consider a broader range of party needs in order to develop their mediation strategy.

Lawyer preparation for court-connected mediation varies considerably between practitioners. The overwhelming majority of lawyers perform tasks that enable them

to build a persuasive argument in relation to their client's legal case. They prepare for mediation very much the same way as they prepare for trial, but do not perform all of the preparation tasks that they would for trial. It appears that roughly half of the practitioners do not consider the individual needs of the parties in their preparation for mediation, but the other practitioners do. The evidence positively addresses the hypothesis that in court-connected mediation the legal issues are the main consideration, although non-legal interests are not discounted entirely in lawyers' own preparation for mediation.

3.2 Preparation of their clients

The way that lawyers prepare their clients for mediation can influence the mediation process enormously, by shaping the nature of client participation and by determining the way that the process will be approached. It was reported in Chapter 2 that several studies have found that party assessments of the fairness of mediation are more likely to be positive if their lawyers prepared them for mediation.¹⁰¹ Macfarlane and Keet found that the clients they spoke with not only felt inadequately prepared for mediation, but also had ideas about what adequate preparation would involve.¹⁰² They wanted preparation that included: basic information about the mediation process, information about confidentiality and 'without prejudice', what paperwork to bring to mediation, some information about negotiation strategy, guidance for the appropriate division of roles between lawyer and client, and discussion about the

¹⁰¹ See Chapter 2 [4.2.2], citing Marie Delaney and Ted Wright, *Plaintiff's Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation* (1997), 66; Wissler (2002), above n30, 687; Bobbi McAdoo and Nancy Welsh, 'Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation' (2004-2005) 5 *Nevada Law Journal* 399, 424.

¹⁰² Macfarlane and Keet (2005), above n69, 693.

different purposes of mediation.¹⁰³ Almost half of the clients interviewed by Macfarlane and Keet told them that they felt ill-prepared for their mediation. Most went into their mediation not knowing about, or feeling confused about what to expect. They reported that the only preparation they received was a brief letter telling them where and when to arrive at mediation or a short conversation, often conducted in the car on the way to mediation.¹⁰⁴ This research clearly demonstrates that clients want to feel well prepared for court-connected mediation.

3.2.1 Checklist responses

Thirty-nine legal practitioners¹⁰⁵ were asked to indicate which of the following matters they typically considered to prepare their clients for mediation.

- Likely trial outcome
- Future costs
- Options for settlement
- Mediation process
- Their clients' needs regarding outcome

It was expected that a thoroughly prepared lawyer would discuss each of these matters with their client prior to a court-connected mediation.¹⁰⁶

¹⁰³ Macfarlane and Keet (2005), above n69, 693.

¹⁰⁴ Macfarlane and Keet (2005), above n69, 692.

¹⁰⁵ Not all legal practitioners were asked all of the questions in the interview schedule. There were a number of reasons for these omissions. See further Chapter 3 [4.1].

¹⁰⁶ Law Society of New South Wales, above n78, 'Professional Standards for Legal Representatives in Mediation' [1]; Mary Walker, 'Guidelines for lawyers in mediations' (2007) 9(8) *ADR Bulletin* 150; Laurence Boulle, *Mediation: Skills and Techniques*, Butterworths Skills Series (2001) 309; Ann Beckingham and Jim Cyngler, 'The Involvement of Lawyers, Accountants and Other Professionals When Attending Their Clients' Mediations' (Paper presented at the 4th National Mediation Conference, Melbourne, April 1998); Cooley (2002), above n80, Chapter 4; Stephen Marsh, 'A mediation checklist' (2002) 17(6) *Commercial Law Bulletin* 8; Spier (1999), above n89, 36.

As with lawyers' own preparation, research has indicated a variety of approaches by lawyers to the preparation of clients for mediation. Divorce lawyers in Maine reported that they typically described the mediation process, seriously examined settlement options and approaches as well as preaching mediation's virtues to clients in preparation for mediation.¹⁰⁷ At the other extreme, Sourdin found that in some cases, Victorian Supreme and County Court clients were prepared by being advised not to speak as by speaking they could adversely affect their prospects of success in future litigation.¹⁰⁸ If a range of lawyer attitudes towards mediation is expected, as described by Macfarlane in her 'ideal types', then the preparation of clients for mediation is bound to vary from practitioner to practitioner.¹⁰⁹

Again, the responses from Tasmanian lawyers were very mixed. Of the thirty nine legal practitioners who responded to this question, seventeen (44%) indicated that they typically discuss all of the matters on the check list with their clients prior to mediation. Eight (21%) reported that they discussed all items except for their clients' needs regarding the outcome. Five (13%) discussed everything except the likely trial outcome with their clients. Two practitioners reported that they discussed all items on the checklist except the likely trial outcome and future costs, two reported that they discussed all items except the mediation process and their clients' needs regarding outcome and another two reported that they discussed all matters except future costs. There appears to be a reasonably eclectic mix of practices in relation to the preparation of clients for mediation.

¹⁰⁷ McEwen, Rogers and Maiman (1995), above n15, 1358.

¹⁰⁸ Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (Victorian Department of Justice, 2009), 54.

¹⁰⁹ See Macfarlane (2002), above n5.

Looking at each individual matter on the checklist, the results indicate that 79% (N=31 of 39) of legal practitioners discuss the likely trial outcome with their clients in preparation for mediation, 85% (N=33) discuss future costs, 97% (N=38) discuss options for settlement, 92% (N=36) discuss the mediation process and 69% (N=27) discuss their clients' needs regarding the outcome of the mediation. The moderate sample size of thirty nine moderates the significance of these percentage figures, which are used here for descriptive purposes only. Nonetheless, the high proportion of responses to most of the items on the checklist demonstrates a clear trend in the preparation of clients for mediation.

3.2.2 Comprehensive legal advice

In keeping with their professional responsibilities, most lawyers consider that it is important to give their clients comprehensive advice in relation to the legal claim prior to mediation. For example:

I think that it is important before you go to a mediation that there should have been a reasonably high level appropriate to the case of written advice and analysis of the case provided to the client. I think that advice should not be a defensive advice either, it should be an advice where the lawyer actually sets out the pros and cons of the case so it does it objectively, sets out the arguments which he perceives that are going to be run against them. And gives what he sees as being the range of reasonable settlement. I just don't think that it's fair for plaintiffs to be in a mediation where they haven't been given that range beforehand. It's just not fair on them to be making decisions under pressure when they haven't been given that before.¹¹⁰

The provision of legal advice in respect of the strengths and weaknesses of the legal

¹¹⁰ Lawyer 5.

claim and the potential trial outcomes is an essential part of the lawyer's role.¹¹¹

Disputants ought to have comprehensive legal advice before they are expected to decide whether or not a settlement offer is acceptable. Their legal position is an important consideration, particularly where they are involved in litigation. Most lawyers (N=31 of 39, 79%) do discuss the likely legal outcome with their clients prior to mediation.

The most surprising results, however, were the number of lawyers who do not discuss the likely legal outcome or future costs in preparation of their clients for mediation. Although most practitioners responded positively to these questions, eight of 39 (21%) do not discuss the likely trial outcome with their clients and six (15%) do not discuss future costs. It is possible that some practitioners answered 'no' to this question because they discussed these matters in any event rather than specifically in preparation for mediation. However, there may be some practitioners who fail to assess the relative strengths and weaknesses of the legal claims or to provide details about legal costs prior to mediation.

Some practitioners placed great faith in the mediation process to assess the strengths and weaknesses of the legal case for them and placed the responsibility for reality testing onto the court-appointed mediators. For example:

I don't try to go into it too detailed to the client, because their eyes seem to open. It's no use, I um, if you explain what the other side may be putting through then they tend to lose confidence and they think that we're arguing for the other side. So you let the court do that process. I explain that there will be a mediator there who's got court training, I explain to them to listen to what the mediator has got to say and 'Because I'm on your side I have to be

¹¹¹ Donna Cooper and Mieke Brandon, 'How can family lawyers effectively represent their clients in mediation and conciliation processes?' (2007) 21 *Australian Journal of Family Law* 1, 5.

objective but the mediator is totally objective.' ... The mediator is the first contact that the client has had with someone neutral about their dispute. The first taste of what the court's going to be like ... and they start being a bit more realistic about things.¹¹²

Comments such as this demonstrate that some lawyers do not provide thorough legal advice to their clients prior to mediation. Their clients are potentially at a disadvantage in mediation and would not be able to assess the appropriateness of a settlement offer adequately on the basis of their lawyer's advice alone. Lawyers should help their clients to prepare for mediation by (amongst other things) undertaking a risk analysis and developing strategies to achieve outcomes that accord with the clients' interests.¹¹³ The practitioners who do not provide an analysis of the strengths and weaknesses of the legal case and the range of possible legal outcomes are not undertaking a risk analysis for their clients, which would make it impossible to develop appropriate strategies for mediation.

Similarly, those legal practitioners who fail to advise their clients in relation to future costs are denying their clients the opportunity to assess the acceptability of settlement proposals. Lawyers should provide to their clients details about costs to date, the likely costs of mediation and the likely costs if a matter does not settle prior to trial.¹¹⁴

3.2.3 Options and process information

Almost all of the thirty nine interviewees who responded to this question (N=38,

¹¹² Lawyer 7.

¹¹³ Walker (2007), above n106; John H Wade, 'Representing Clients Effectively in Negotiation, Conciliation and Mediation in Family Property Disputes' (2004) 17 *Bond Dispute Resolution News* 7, 10.

¹¹⁴ Law Society of New South Wales (2007), above n78, 'Professional Standards for Legal Representatives in a Mediation' [1.9].

97%) confirmed that they discuss options for settlement with their clients prior to mediation. The nature of such options will vary depending upon the subject matter of the dispute and the style of negotiation which it is intended to conduct. Mediation at the Court is sometimes conducted in the settlement style of mediation. If the incremental bargaining style of negotiation is intended, then lawyers should help their clients to anticipate the settlement range.¹¹⁵ If it is intended to engage in interest-based negotiation, then an exploration of the clients' individual needs and interests, generation of possible options and evaluation of those options are valuable preparation activities.¹¹⁶ Some guidelines recommend that lawyers assist their clients to consider a wider range of options than those available in a court.¹¹⁷ The interviewees did not elaborate on the subject matter of the options they discuss with their clients prior to mediation. It is, however likely in light of the style of mediation conducted at the Court, that the options discussed are the legally available options within an expected settlement range.

Nearly all interviewees (N=36 of 39, 92%) indicated that they discuss the mediation process with their clients in preparation for mediation. Explaining the mediation process is a fundamental part of the lawyer's role in mediation.¹¹⁸

3.2.4 Non-legal interests

In contrast to the lower number of lawyers who consider the needs of the parties in their own preparation (N=22 of 39, 56%), a greater number of interviewees (N=27 of

¹¹⁵ Cooper & Brandon (2007), above n111, 12.

¹¹⁶ Cooper & Brandon (2007), above n111, 30-33.

¹¹⁷ Law Society of New South Wales (2007), above n78, 'Professional Standards for Legal Representatives in a Mediation' [1.5].

¹¹⁸ Law Society of New South Wales (2007), above n78, [1.1]; Sordo (1996), above n78, 22; Blitman (2003), above n80.

39, 69%) indicated that they do discuss the needs of the parties with their clients prior to mediation.¹¹⁹ Again, the awkwardness of the term 'needs' is acknowledged. Some lawyers consider their client's needs and then apprise their clients of the limited remedies that are available from the legal system, which may or may not meet those needs. For example:

I ask the client what their expectations are. I'll probably ask them several times through the course of the litigation what their expectations are, because you want to know whether their expectations can be met by the process, because many people have very very unrealistic expectations about the process. Interestingly enough, at both levels, too high and too low...¹²⁰

This attitude may explain why some lawyers discuss the needs of the parties with their clients but do not consider the needs of the parties in their own preparation for mediation. The discussion in relation to needs may be more about managing the clients' expectations rather than expanding the relevant considerations at mediation. This approach is consistent with client-centred practice because clients' expectations are being modified rather than ignored. Presumably, if dispute resolution options have been considered properly, the matter has reached court-connected mediation because that is the most appropriate means of pursuing the client's needs and interests.

The remaining twelve of the thirty nine respondents (31%) do not typically discuss the needs of the parties with their clients. Two practitioners explicitly stated that in their opinions the needs of the disputants are not an appropriate focus in court-connected mediation:

I don't think it's appropriate to enter a mediation thinking about what the plaintiff or defendant needs. Because I think that's putting the wrong emphasis on what you're trying to

¹¹⁹ 27 out of the 39 legal practitioners who were asked this question.

¹²⁰ Lawyer 24.

achieve in the court process, in the mediation process. You can understand that your client will not settle for a certain figure because it will bankrupt his company or something of that nature, but I think it's more appropriate to look at what your client can achieve at trial, and give them that advice and look at the range. Because there's absolutely no point in saying to your client "I understand that you need this to settle for \$200,000 or less. And that we won't go any further than that." Whereas it's pretty clear on your assessment of the case that it's a \$300-\$350,000 sort of case. And the other side knows that as well and you fossick that out of them that they definitely know that it's a \$300,000 minimum case. You have to say to your client 'I understand that you need this to settle for less than \$200,000 but it won't. You need to stop looking at the litigation process as a way to resolve your financial issues, you need to go and look at your financial issues and solve that problem.' You can certainly look at what your client wants but sometimes you need to give them very strong advice about what the litigation process can give them.¹²¹

Mediation is an objective process and the client's needs are not relevant because the outcome will be determined by the influence of the law.¹²²

Both the way that some lawyers respond to their clients' needs and the small number of lawyers who do not entertain discussion of those needs emphasise the priority of legal issues and arguments in court-connected mediation.

3.2.5 Lawyers' preparation of their clients

In summary, less than one half of the thirty nine lawyers reported that they consider all of the matters on the checklist in preparation of their clients for mediation. Nearly all practitioners discuss the mediation process and options for settlement with their clients prior to mediation. Most lawyers reported that they give their clients

¹²¹ Lawyer 30.

¹²² Lawyer 42.

comprehensive advice in relation to the legal claim prior to mediation. However, some lawyers do not discuss the likely trial outcome or future costs with their clients prior to court-connected mediation. Some of these practitioners may not discuss these matters at all. A proportion of the interviewees reported that they do not discuss their client's needs in preparation of their clients for mediation.

There was some recognition by interviewees that there is some need for change in respect of lawyer preparation of themselves and their clients for mediation.

Interviewees were asked 'What needs to change in relation to the mediation programme at the Supreme Court?' Three practitioners mentioned that there was a need for an increased amount of preparation for mediation by lawyers.¹²³

Furthermore, another practitioner felt strongly about the inadequate preparation of some practitioners and recommended the introduction of penalties for lawyers who fail to advise their clients appropriately prior to mediation.¹²⁴ Albeit that these were a small number of comments, there is clearly some concern within the profession about some lawyer approaches to preparation for mediation. This is consistent with concerns expressed by lawyers practising in other jurisdictions, discussed above.

4 The roles of participants in court-connected mediation

The roles of participants in mediation are inter-related. Lawyers are the primary source of information received by their clients about the nature of court-connected mediation and the roles of participants in it. Lawyer practices in giving this advice and their opinions in relation to the appropriate roles of participants are highly influential in shaping court-connected mediation practice. During the interviews a

¹²³ Lawyers 5, 24 and 34.

¹²⁴ Lawyer 34.

number of questions were asked which sought information about lawyer practices and attitudes in relation to the appropriate roles of participants during court-connected mediation.

4.1 The disputants' role

The disputants' role in mediation varies considerably, according to the nature and extent of direct disputant participation and the control that disputants have over the process and content of mediation. Lawyer attitudes towards their clients' direct participation and control within mediation provides an indicator of the extent of self-determination achieved in court-connected mediation. The primary measure of self-determination in this thesis is direct disputant participation and it is hypothesised that lawyers rather than disputants are the main participants in the court-connected programme.

4.1.1 Participation

Potentially, mediation offers an opportunity to disputants to participate directly in the resolution of their own disputes.¹²⁵ Direct disputant participation is not necessarily evidenced in mediation practice, particularly in court-connected mediation.¹²⁶ For example, Sourdin's recent investigation in the Supreme and County Courts of

¹²⁵ Chapter 2 [4]; Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005), 60-68 and 227-228; Tania Sourdin, *Alternative Dispute Resolution* (2nd ed, 2005) 28; *Australian National Mediator Standards: Practice Standards* (National Mediation Conferences Limited and Western Australian Dispute Resolution Association, 2007) Standard 2.

¹²⁶ Nancy A. Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1; Nancy Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice' (2002) 2002 *University of Missouri Journal of Dispute Resolution* 179.

Victoria found that plaintiffs were often not involved in personal injuries mediations at all.¹²⁷

It was established in Chapter 2 [4.2.2] that the opportunity to participate in mediation is an indicator of the core mediation feature of self-determination. Although the degree of disputant participation may vary, disputants' preferences should drive decisions about their participation if self-determination is to be achieved.

Research findings about disputant participation in court-connected mediation

International research reveals that there is variety in the extent of direct disputant participation in court-connected mediation. Some research indicates that many lawyers shape the extent of direct disputant participation according to the individual circumstances of a dispute. For example, divorce lawyers in Maine reported that the participation of their clients varied according to the needs and skills of the clients.¹²⁸ They reported that their clients often participated actively in mediation. These lawyers valued mediation for the opportunity it provided for direct disputant participation, under the supervision of legal counsel.¹²⁹ Litigation lawyers in Macfarlane's research in Toronto and Ottawa also reported variation in the roles played by clients and referred to individual circumstances as the determinant of the appropriate role of clients.¹³⁰

Lawyers do not necessarily support active participation by their clients in mediation. For example, three quarters of the lawyers interviewed by Gordon in North Carolina

¹²⁷ Sourdin (2009), above n108, 71.

¹²⁸ McEwen, Rogers and Maiman (1995), above n15, 1363, 1371; McEwen, Mather and Maiman (1994), above n23, 167-168.

¹²⁹ McEwen, Mather and Maiman (1994), above n23, 167.

¹³⁰ Macfarlane (2002), above n5, 270.

disagreed with the statement that 'litigants should be the most active participants in a mediation, with attorneys standing by to give legal advice.'¹³¹ Seven out of the ten lawyers interviewed by Gerschman reported that they rarely, if ever, afford their clients opportunities to participate actively in the mediation process.¹³² Macfarlane observed a range of practices amongst the Canadian civil litigation lawyers she interviewed, with some actively discouraging active participation by their clients and others actively encouraging it.¹³³ Some expressed serious misgivings about 'client control' issues arising from direct participation of clients.¹³⁴ McEwen et al observed that divorce lawyers in Maine almost universally encouraged their clients to take the lead role in mediations and to participate actively in the process.¹³⁵ However, there were four or five exceptions, who told their clients to listen and to let the lawyer do most of the talking.¹³⁶

Mediators also affect the extent of disputant participation in mediation. Lawyers in McAdoo and Welsh's United States research observed mediator encouragement of client participation and saw this as an effective contribution to party engagement in the mediation process.¹³⁷ Mediators in the Central London County Court considered that lawyers were particularly helpful when they spoke on their clients' behalf about some matters, such as the merits of the legal case and costs, indicating support for a spokesperson role.¹³⁸

¹³¹ Gordon (1999), above n30, 227.

¹³² Gerschman (2003), above n84, 9.

¹³³ Macfarlane (2002), above n5, 275-276.

¹³⁴ Macfarlane (2002), above n5, 275.

¹³⁵ McEwen, Rogers and Maiman (1995), above n15, 1371; McEwen, Mather and Maiman (1994), above n23, 167.

¹³⁶ McEwen, Mather and Maiman (1994), above n23, 167.

¹³⁷ McAdoo and Welsh (2004-2005), above n101, 420.

¹³⁸ Genn et al (2007), above n41, 124.

Some research has provided insight into disputant preferences about the extent of their participation in mediation and was discussed in Chapter 2.¹³⁹ It is useful to reflect upon some findings here, as the disputant view is not included in the present study. Mediating parties value a process that provides them with an opportunity to speak, an assurance that they have been heard and understood and an opportunity to meet with the other disputant.¹⁴⁰ These findings, together with the insights into lawyer preferences outlined above, demonstrate that there is often tension between the preferences of clients and their lawyers in relation to the participation of clients in mediation.¹⁴¹

Decision-making about disputant participation

The differing perspectives of lawyers and clients are also apparent in relation to decision making control about the direct participation of clients. A lawyer in charge model is usually maintained in mediation representation.¹⁴² A notable exception is McEwen et al's research involving divorce lawyers in Maine, who reported that clients determine the extent of their participation in mediation.¹⁴³

In the Supreme Court of Tasmania, the degree to which disputants participate directly in mediation appears to be determined by the legal practitioners rather than

¹³⁹ See Chapter 2 [2.5.3] and [4.2], citing Nancy Welsh, 'Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value' (2004) 38 *Ohio State Journal on Dispute Resolution* 573, 619; Delaney and Wright (1997), above n101, 50; Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009), 142, Chapter 2; Macfarlane and Keet (2005), above n69, 691-692.

¹⁴⁰ See above n139.

¹⁴¹ See for example Relis (2009), above n141 reporting that lawyers were generally in charge and there was some evidence of tension between lawyers and clients about client participation.

¹⁴² Relis (2009), above n141; Macfarlane (2002), above n5; Gordon (1999), above n30; Gerschman (2003), above n84.

¹⁴³ McEwen, Rogers and Maiman (1995), above n15; McEwen, Mather and Maiman (1994), above n23.

by the disputants themselves. Many legal practitioners indicated during interviews that they decide upon the degree of participation by their clients. In their responses to the questions 'How do you prepare yourself and your client for mediation?' and 'How does a typical mediation work at the Supreme Court of Tasmania?' twenty-nine practitioners provided insight into their practices in relation to direct disputant participation in mediation. The verbs used by these practitioners to describe their interaction with their own clients in regard to the client's participation included 'tell',¹⁴⁴ 'direct',¹⁴⁵ 'decide',¹⁴⁶ and 'advise'.¹⁴⁷ One practitioner makes a 'determination',¹⁴⁸ as to whether or not the client is able to speak for themselves in mediation. Another practitioner indicated that she 'recommends' that her client does not speak.¹⁴⁹ The language chosen suggests that lawyers are quite interventionist in the decision about whether or not a disputant will participate directly in mediation.

Lawyers' attitudes towards disputant participation

Some lawyers believe that it is undesirable for any disputants to participate directly in mediation. They either tell or advise all of their clients not to say anything during the mediation process. The majority of the twenty nine practitioners who addressed the issue of direct disputant participation during the interviews (N=26, 88%) did not support uncontrolled disputant participation. For example:

[T]he best advice to give a client, whether it be an insurer or plaintiff client is 'let me do the talking.' So the client says nothing ideally and the lawyer would go point by point through the liability issues...¹⁵⁰

¹⁴⁴ Lawyers 3, 6, 11 and 24.

¹⁴⁵ Lawyers 18 and 30.

¹⁴⁶ Lawyers 29 and 35.

¹⁴⁷ Lawyers 34 and 42.

¹⁴⁸ Lawyer 14.

¹⁴⁹ Lawyer 20.

¹⁵⁰ Lawyer 37.

Generally speaking, the parties don't say anything unless they want to, because quite often it's not helpful. The lawyers are over the facts and having emotion added in doesn't help anything. Although in some cases it can, particularly in disputes over deceased estates, it's quite useful to have a party having something to say.¹⁵¹

The second comment reflects the views of mediators discussed in Chapter 4 [3.5], that ordinarily court-connected mediation does not require a focus on non-legal issues or direct disputant participation, but it might be appropriate in a small group of cases.

By contrast, the following practitioner does prefer that his clients outline their own cases in mediation. However, he coaches them as to what that case is beforehand.

Then I'll also warn them that they may be required to outline their own case and ... ask them what their own case is. Because often by that point they will have lost track about what their own case is actually about and then I'll obviously need to advise them if they have lost track because sometimes you do find that.¹⁵²

There were some indications that lawyers understand that mediation provides an opportunity for direct disputant participation. In recognition of this opportunity, some lawyers tell their clients that they can speak if they want to, however many practitioners followed this with a warning about the danger of saying something detrimental to their legal case in mediation. For example:

I always tell the client that they have a right to speak if they want to, but that my advice is that they don't unless on specific topics that we've discussed.¹⁵³

¹⁵¹ Lawyer 16.

¹⁵² Lawyer 8.

¹⁵³ Lawyer 34.

I'm probably naughty because I would be telling my client not to speak. I would be saying to my client that it's their conference, they can speak if they want to, but my recommendation would be not to speak unless it's about their experience of pain. I'm happy for them to speak about their experience of pain and the difference it's made to their life, but I discourage them speaking about how the accident happened, so issues that are really relevant to liability.¹⁵⁴

These results, albeit based upon a sample of only twenty-nine comments, suggest that a majority of lawyers are cautious about direct disputant participation in mediation. The majority of respondents were of the opinion that the appropriate role of a client in mediation is passive. Clients should either not participate or participate when invited or allowed to by their legal practitioner. Lawyers tend to discourage their clients from participating directly, to manage their clients' participation or to decide for their clients what the appropriate degree of disputant participation is in a particular case. Lawyers are, in short, the stage managers of disputant participation. In response to the small sample of comments addressing the issue of direct disputant participation, reference can be made to other research findings, such as those discussed above. The present results are consistent with Gordon and Gerschman's findings derived from their interviews of lawyers.¹⁵⁵ Some contrasting evidence of lawyer practices in mediation has been identified in the family law context.¹⁵⁶ Clearly, there are variations of practice between individual lawyers, locations and practice areas.

Disputant participation in practice

In the Supreme Court of Tasmania, the interview and observation data indicate that

¹⁵⁴ Lawyer 20.

¹⁵⁵ Gordon (1999), above n30, 227; Gerschman (2003), above n84, 9.

¹⁵⁶ McEwen, Mather and Maiman (1994), above n24, 1375.

direct disputant participation is not prevalent in most torts and many simple commercial matters.¹⁵⁷ The primary participants in mediation of these disputes are the lawyers and the mediator. This is consistent with the attitudes demonstrated by lawyers towards the direct participation of their clients. If disputants participate in court-connected mediation at the Supreme Court, it is usually to either present their story of how their dispute or injury has affected them or to answer questions put to them by one of the legal practitioners or the mediator. Legal practitioners and mediators tend to control the mediation process and content. This tends to take the focus away from the disputants and their goals and moves the focus towards their lawyers instead. On the other hand, in relationship or estate matters disputants are more likely to participate directly than in other matters.¹⁵⁸ In those types of disputes there are no legal questions of fault and the future needs of the parties is a legal issue. Furthermore, the disputants are directly involved in mediation and have a relationship with one another.

There was some evidence that legal practitioner control over disputant participation was reinforced by mediators. For example, during one observed personal injuries mediation the plaintiff started answering a question that had been posed by the defendant's legal practitioner. The mediator interrupted the plaintiff, looked at the plaintiff's lawyer and asked 'Are you happy for [the plaintiff] to speak?'¹⁵⁹ This example, together with other observations, indicated that the court-connected mediators sometimes reinforce lawyer control over the degree of disputant

¹⁵⁷ Chapter 4 [3.5].

¹⁵⁸ Chapter 4 [3.5]. This trend was reported by mediators and the interview data alone is relied upon in drawing this distinction. No observations were conducted in these kinds of matters.

¹⁵⁹ Observation 1st June 2007. Discussions with two mediators after this observation confirmed that it was not unusual for mediators to check whether lawyers were comfortable with their clients answering questions from the other legal practitioner.

participation. Sometimes the mediator who asked such a question might be inviting the lawyer to resist potential cross-examination of his or her client by another lawyer. Mediators reported in interviews that they do support disputant participation but that they usually leave the decision about whether or not to participate between the lawyers and their clients. This practice contrasts with the mediator behaviour promoted in some literature, which proposes that one of the mediator's roles is to encourage advisors to allow the disputant to speak directly.¹⁶⁰

Advantages and disadvantages of direct disputant participation

The tendency for lawyers to discourage direct disputant participation may be explained by an analysis of lawyer's understanding of the potential advantages and disadvantages of direct disputant participation. In relation to direct disputant participation, there was evidence of a lack of appreciation within the Tasmanian legal profession of the potential benefits that direct disputant participation can offer. Twenty-nine of the forty two interviewees (69%) did not mention direct disputant participation as either a beneficial or detrimental feature of court-connected mediation. This suggests that from the perspective of many lawyers, direct disputant participation is not considered to be a fundamental feature of the process. Legal practitioners who do not consider that direct disputant participation is a fundamental or significant feature of mediation are unlikely to encourage their clients to participate directly in it.

¹⁶⁰ Boulle (2001), above n106, [5.16] and [10.55]; Micheline Dewdney, *Party, Mediator and Lawyer-Driven Problems and Ways of Avoiding Them* (2007) LEADR <www.leadr.com.au/articles> at 25 June 2007; Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (2nd ed, 2004).

Thirteen of the forty two legal practitioners (31%) mentioned direct disputant participation in relation to positive or negative features of mediation. Only six (14%) interviewees mentioned it in response to the questions 'What are the advantages of court-connected mediation?' or 'What are we gaining by having so many cases go to mediation?' which encouraged interviewees to identify beneficial features of mediation.¹⁶¹ Two examples of these comments are:

So to give people the opportunity to resolve it at that stage where they feel that they can participate in it and that they've had some control over their destiny is definitely a good thing.¹⁶²

...they get to talk ... If you're acting for a plaintiff they get to express their anger or their confusion or their despair if you like ... I think that's very good.¹⁶³

These types of comments were made by only a small number of practitioners and therefore may represent a minority view within the legal profession. They do reflect both a focus on non-legal interests and the encouragement of direct disputant participation.

A small number of lawyers' interview responses reflected a range of concerns about the dangers of direct disputant participation. Seven lawyers (17% of 42 interviewees) nominated direct disputant participation as a disadvantage of the mediation process.¹⁶⁴ The primary reasons offered for considering disputant participation to be a disadvantage were the disputants' perceived lack of experience at mediation,

¹⁶¹ Lawyers 4, 6, 21, 23, 39 and 40.

¹⁶² Lawyer 6.

¹⁶³ Lawyer 4.

¹⁶⁴ Lawyers 1, 2, 8, 9, 22, 24 and 31.

communication skills or intellectual capacity. These reasons are illustrated by the following extracts:

The only person disadvantaged in the process is the lay plaintiff. Everyone else has been there before.¹⁶⁵

Often they don't have the capacity to deal with the intellectual arguments that are being made.¹⁶⁶

It is the plaintiff's mediation and I'm generally speaking quite happy for my client to speak and say what difficulties they are having because they're the person that is living it ... But the disadvantage of that can be that the plaintiff might not be a very good communicator or actually might sound as if they're not being totally honest, or that they are exaggerating.¹⁶⁷

Potential damage to the legal arguments prepared by the lawyers was an additional disadvantage of direct disputant participation that was identified. Exposure of the client as a weak witness was perceived to detract from the strength of the legal case. Three legal practitioners demonstrated that they were concerned about their clients revealing something in mediation that the lawyer believed ought not be revealed.¹⁶⁸

For example:

...your client might start shooting from the hip and saying things that you wish that they had never revealed, your client might be aggressive or show that they're not going to be a credible witness.¹⁶⁹

This comment also reveals a concern about losing control over the client.

¹⁶⁵ Lawyer 1.

¹⁶⁶ Lawyer 2.

¹⁶⁷ Lawyer 31.

¹⁶⁸ Lawyers 8, 9 and 31.

¹⁶⁹ Lawyer 8.

Another practitioner commented that direct disputant participation was an obstacle to frank discussion between lawyers.¹⁷⁰ Where he wanted to raise fundamental problems such as a disputant's credibility he preferred to negotiate directly with the other lawyer rather than to conduct a mediation in the presence of the clients.¹⁷¹

Overall, lawyers appear to be more concerned about potential problems arising from direct disputant participation than the potential benefits. Nevertheless, there were a mixture of views and practices, consistent with the variety observed in other lawyer populations.¹⁷²

4.1.2 Control of content or process

It was concluded in Chapter 2 that the degree of disputant control over the content of mediation varies within the mediation field. Control is examined here as a means of interrogating the dynamics between lawyers and their clients, rather than assuming that parties rather than lawyers or mediators should always have maximum control over the mediation process and/or content.

Generally, lawyers maintain that clients have more control in mediation than in other litigation and negotiation processes.¹⁷³ Macfarlane found some evidence of changed assumptions about control and ownership of conflict, identified by some lawyers as

¹⁷⁰ Lawyer 24.

¹⁷¹ The practitioner did not elaborate as to the positive consequences of having an opportunity to tell the other lawyers that their client lacked credibility.

¹⁷² See for example: Macfarlane (2002), above n5; Macfarlane and Keet (2005), above n69; Sourdin (2009), above n108; McEwen, Rogers and Maiman (1995), above n15; McEwen, Mather and Maiman (1994), above n23; Gordon (1999), above n30; Gerschman (2003), above n84; McAdoo and Welsh (2004-2005), above n101; Genn et al (2007), above n41; Relis (2009), above n141.

¹⁷³ See for example: Gordon (1999), above n30, 228 (two third of lawyers thought clients had more control over outcome in mediation than they would otherwise have); Cf McAdoo and Welsh (2004-2005), above n101, 420, where few lawyers perceived that mediation increased their client's control.

evidence of the evolution of lawyers' professional role and identity.¹⁷⁴ Client data drawn from other research is mixed as to the extent of control that they report over the mediation process and/or outcome. Seventy eight percent of parties surveyed in North Carolina reported that they had a chance to tell their side of the story, one third said that the process made it hard for them to express themselves, a little over a third felt that they had control over the way that the conference was handled and a similar number felt that they had control over the outcome.¹⁷⁵ Sixty one percent of the plaintiffs in Delaney and Wright's New South Wales study reported that they had some or a lot of control over the mediation outcome.¹⁷⁶ McAdoo and Welsh reported that most parties perceived that they had a sufficient opportunity to present their views, that they had some input but not necessarily control over the outcome of the mediation.¹⁷⁷ The mixed results suggest that many parties are satisfied with an opportunity to participate without needing to have control over the process or outcome. Therefore, lawyer control does not necessarily equate with client dissatisfaction. On the contrary, many clients prefer that their lawyer manages the case on their behalf. Therefore it is difficult to draw assumptions about the preferences of disputants in relation to control over the mediation process. The disputant view in the Supreme Court of Tasmania is not part of this study and therefore there is no programme-specific data available at this stage.

Most of the Tasmanian legal practitioners who were interviewed did not mention disputant control of process or content as either an advantage or disadvantage of

¹⁷⁴ Macfarlane (2002), above n5, 295.

¹⁷⁵ Gordon (1999), above n30, 228-229; Stevens H Clarke, Elizabeth D Ellen and Kelly McCormick, 'Court Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects' (North Carolina Administrative Office of the Courts, 1995), 40.

¹⁷⁶ Delaney and Wright (1997), above n101, 48.

¹⁷⁷ McAdoo and Welsh ((2004-2005), above n101, 423-424.

court-connected mediation.¹⁷⁸ The observations supported the conclusion that lawyers rather than disputants tend to control the content of mediation at the Court. Lawyer control was also evidenced by the way that some legal practitioners described the control that disputants have over mediation content. For example, for one practitioner, disputant control meant that the disputant had an opportunity to request a private meeting with their lawyer, rather than any real control over the content of the mediation:

Disputants have more control over the process. They can ask to have an opportunity to speak with their legal counsel.¹⁷⁹

Control was also defined by comparison to the lack of control that disputants have in trial proceedings:

Otherwise they can go to a court, they've got no control in a court, no control over a witness, no control over the evidence, no control over the practitioner or what the judge might decide. They just lose control totally.¹⁸⁰

They retain control of the dispute, rather than abdicating responsibility for the trial to a judge.¹⁸¹

Other than these comments, no legal practitioner mentioned disputant control over the content of mediation. The notable near absence of comment about disputant control by most interviewees suggests that for most legal practitioners, disputant control is not considered to be an important aspect of court-connected mediation. This is consistent with Welsh's finding that few lawyers choose mediation because they perceive that their clients might experience greater control in mediation.¹⁸²

¹⁷⁸ Only three interviewees made such comments (of 42 =7%). They were lawyers 1, 6 and 12.

¹⁷⁹ Lawyer 1.

¹⁸⁰ Lawyer 6.

¹⁸¹ Lawyer 12.

¹⁸² Welsh (2004), above n139, 591.

The tendency for lawyers to stage manage their clients' participation in mediation is consistent with their preference to control the mediation and their client. However, the data in relation to control are scant and certain conclusions cannot be drawn from it alone.

4.2 The mediator's role

The mediator's role varies widely between mediation purposes and practice models. At a minimum, mediator control of the process provides a safeguard for procedural fairness, because the mediator can ensure that all disputants have an opportunity to participate. There were disparate views expressed by interviewees in relation to the role of the mediator in influencing both process and content. This is consistent with previous research, which indicates that lawyers and parties tend to accept 'an eclectic or pluralistic assortment of styles'¹⁸³ of mediation, including both facilitative¹⁸⁴ and evaluative techniques.¹⁸⁵ Some studies have shown that many lawyers prefer evaluative, rights-based mediators to facilitative, interest-based mediators.¹⁸⁶

Macfarlane found that amongst lawyers who were most opposed to court-connected mediation, evaluative mediation was seen as relatively 'safe' because it emphasised the known, anticipated legal outcomes and facilitative mediation was seen as comparatively 'risky' because it emphasised unknown, non-legal factors.¹⁸⁷ Lawyers also tend to appreciate the mediator's ability to reality test and thereby assist them to

¹⁸³ Jeffrey H Goldfien and Jennifer K Robbennolt, 'What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles' (2007) 22 *Ohio State Journal on Dispute Resolution* 277, 316.

¹⁸⁴ Macfarlane and Keet (2005), above n69, 693-694

¹⁸⁵ Macfarlane (2002), above n5, 287; Welsh (2004), above n139, 619-620.

¹⁸⁶ Relis (2009), above n141, 207; McAdoo (2002), above n55, 405-406, 434-435; McAdoo and Welsh (2004-2005), above n101, 419-420; Gordon (1999), above n30, 228

¹⁸⁷ Macfarlane (2002), above n5, 284-285.

manage unrealistic expectations by a party.¹⁸⁸ Lawyers tend to prefer mediators with legal qualifications, experience practising law and trial experience.¹⁸⁹ This preference reflects the general preference for an evaluative style of mediation.

Aspects of the mediator's role include control of the mediation process, applying some degree of pressure to settle and evaluating the merits of the legal arguments.

Interview responses in relation to each of these aspects are considered below.

4.2.1 Control of the mediation process

In relation to mediator control of the mediation process, some studies have reported that lawyers value proactive control by mediators and would like the degree of process control to be increased.¹⁹⁰

There was some evidence that mediators in the Supreme Court of Tasmania tend to allow the legal practitioners to manage the mediation process.¹⁹¹ Consequently, the mediators do not guide the disputants through an interest-based bargaining process, as would be expected in a facilitative mediation. Instead the style of negotiation conducted within the Court's mediation programme tends to be the style preferred by legal practitioners. This is usually an adversarial incremental bargaining style.¹⁹²

¹⁸⁸ McEwen, Rogers and Maiman (1995), above n15, 1370; Schildt, Alfini and Johnson (1994), above n28, 30-31; Genn et al (2007), above n41, 104.

¹⁸⁹ Gordon (1999), above n30, 228; Relis (2009), above n141, 205; Macfarlane (2002), above n5, 285; McAdoo and Hinshaw (2002), above n10, 524; Goldfien and Robbennolt (2007), above n183, 297 and Hartley (2002), above n15, 187. Cf Macfarlane and Keet (2005), above n69, where around half of the mediators in the programme did not have legal qualifications and this was accepted by the legal profession.

¹⁹⁰ See for example: Schildt, Alfini and Johnson (1994), above n28, 30; Macfarlane (2002), above n5, 288.

¹⁹¹ See Chapter 4 [5.1.1].

¹⁹² See Chapter 4 [5.1.2].

It appears that Tasmanian lawyers are divided about whether or not mediators ought to manage the mediation process proactively. On the one hand, in response to the question, 'What needs to change in relation to the Supreme Court's mediation programme' seven of the forty two respondents (17%) expressed the view that mediators should exercise more control over the mediation process.¹⁹³ For example:

Mediators need to be more active in controlling the process and behaviour of legal practitioners. Litigators need and want control and have a personal investment in the case. Mediators ought to be more proactive in dealing with tremendous imbalance between lawyers.¹⁹⁴

I think it would be of benefit if there was some increased training for the mediators in terms of actually running it and actually keeping a lid on issues that sometimes get out of control. Now they don't get out of control in a court of law but if they do the judge bangs the gavel and suddenly everyone's where they should be. But I think the mediators from time to time allow – it's like the chairman of a meeting, there's a right to speak and there's a right of reply but there's not this yelling across the room type of thing. I've noticed with some mediators they don't accept the fact or they don't recognise the fact that they can say enough is enough, this is what we are doing. They have to assert themselves.¹⁹⁵

On the other hand, seven other interviewees¹⁹⁶ (17%), in response to the question 'What ought to remain the same in the Supreme Court's mediation programme?' expressed a view that the mediators' style ought to remain the same. For example:

It's helpful having mediators who are both fairly firm and strong and a little bit detached or more formal and who know the law.¹⁹⁷

¹⁹³ Lawyers 2, 10, 12, 20, 27, 32 and 41.

¹⁹⁴ Lawyer 2.

¹⁹⁵ Lawyer 32.

¹⁹⁶ Lawyers 1, 7, 14, 16, 21, 26 and 37.

¹⁹⁷ Lawyer 7.

The following comment demonstrated approval of Tasmanian Supreme Court mediators who do not control the mediation process but who allow lawyers to exercise that control. The Tasmanian process was viewed more favourably than other court-connected mediation processes encountered in Victoria.

I think that generally speaking our mediators do a good job. ... whereas in some of the big commercial mediations that I've attended the mediators have controlled the process much too much. ... They don't like to relinquish control of the proceedings to other people but I think it's important often that they do.¹⁹⁸

By contrast, two lawyers told 'worst experience at mediation' stories that complained of a lack of commitment to or engagement with the mediation process by mediators.¹⁹⁹ For example:

Sometimes the mediators aren't on top of the issues and don't really add anything to the process.²⁰⁰

These comments, although few in number, demonstrate the divided opinion amongst lawyers about the proper nature of the mediator's role in controlling the mediation process. Overall, more comments were made that reflected an expectation that mediators will control the mediation process. The reasons behind this expectation varied from ensuring fairness to being able to participate in conversation about the legal issues. As a minimum, mediators are generally expected to temper non-cooperative behaviours. Macfarlane and Keet also found in their research into the Saskatchewan Queen's Bench Civil Division programme that lawyers wanted mediators to be proactive in managing a lack of cooperation with the process and to

¹⁹⁸ Lawyer 14.

¹⁹⁹ Lawyers 1 and 9.

²⁰⁰ Lawyer 9.

stand up to counsel who were not participating in good faith.²⁰¹ The researchers concluded that lawyers valued facilitative techniques but also wanted mediators to employ directive techniques.²⁰²

4.2.2 Pressure to settle

Another aspect of the mediator's role that was referred to during the interviews was the mediator's influence on settlement. Theoretically, the impartial mediator does not have an investment in settlement and therefore does not impose pressure on the parties to reach agreement. In practice, however, mediators exercise a variety of techniques to encourage disputants to agree to a settlement. This is particularly likely where the performance of the mediators is measured according to the proportion of matters that settle at mediation. This is the case in the Supreme Court of Tasmania, where the overall success of the programme is measured by settlement rates.²⁰³ Settlement is often a primary purpose for both institutions and parties in mediation, although its priority can sometimes be overstated.²⁰⁴

Mixed lawyer opinions about the appropriateness of mediator pressure to settle have been observed in other studies. For example, lawyers in Saskatchewan saw the mediator's role as including keeping parties focused on the goal of settlement.²⁰⁵ In the Judicial Circuit of Illinois it was found that lawyers would appreciate an encouraging mediator who pushed the parties towards settlement, but 21% of attorneys (N=26 of 124) felt that the mediator did not push hard enough for settlement and 12% (N=15 of 124) felt that the mediator did not encourage the

²⁰¹ Macfarlane and Keet (2005), above n69, 695.

²⁰² Macfarlane and Keet (2005), above n69, 695.

²⁰³ Chapter 4 [2.3].

²⁰⁴ See discussion in Chapter 2, particularly [3.2.4].

²⁰⁵ Macfarlane and Keet (2005), above n69, 695.

parties to reach settlement.²⁰⁶ Lawyers were more likely to hold these views in cases where the matter had not settled.²⁰⁷ Contrasting concerns were expressed by lawyers in Missouri, Maine and New Hampshire, who said that some mediators pressed too hard for settlement and/or push the parties to accept a particular settlement.²⁰⁸ The problem with over-zealous attempts to reach a settlement by a mediator was demonstrated by Welsh, who found that parties' perceptions of procedural fairness were reduced when mediators pressured settlement.²⁰⁹

On the one hand, some Tasmanian lawyers accept a degree of pressure to settle from mediators. For example, one practitioner remarked:

I sometimes request mediators with particular skills in certain types of files. Some mediators will take a more aggressive approach towards settlement and in situations where your parties are locked in litigation that form of conciliation is the only form that's going to reach a settlement. Because the conciliator will really bang the heads together in a room while a softer conciliator who is equally a good conciliator would be useless in that situation.²¹⁰

This comment demonstrates that the lawyer accepts that mediators can be highly interventionist in relation to pursuing settlement. The choice of the word 'conciliator' may also reflect an expectation of evaluation by the mediator, although many practitioners use the terms 'mediator' and 'conciliator' interchangeably.²¹¹ The comment is consistent with some research in the United States which indicated that

²⁰⁶ Schildt, Alfini and Johnson (1994), above n28, 30.

²⁰⁷ Schildt, Alfini and Johnson (1994), above n28, 30.

²⁰⁸ McAdoo and Hinshaw (2002), above n10, 532; McEwen, Mather and Maiman (1994), above n23, 163.

²⁰⁹ Welsh (2004), above n139, 648.

²¹⁰ Lawyer 8. Many lawyers used the terms 'mediator' and 'conciliator' interchangeably. Two factors contribute to this, first, that the primary form of dispute resolution used in the Magistrates Court of Tasmania is called conciliation and secondly, that the definition of mediation in the *ADR Act* expressly includes conciliation.

²¹¹ See above n216.

lawyers and disputants would accept a mediator who pushed them towards settlement, provided that they could still participate.²¹²

On the other hand, two practitioners related a 'worst experience' at mediation where they considered that the mediator applied pressure on the disputants to settle.²¹³

Clearly, although these were isolated comments, not all practitioners approve of pressure to settle from mediators.

Other 'worst experiences' reflected situations where expectations about the mediator's proper role were not met. Concerns were raised about the standard of mediator impartiality,²¹⁴ protection of confidentiality,²¹⁵ preparation²¹⁶ and training.²¹⁷

Two practitioners told stories that indicated that there have been instances of serious breaches of confidentiality or actual bias demonstrated by mediators in the Court's programme.²¹⁸ For example:

The mediator demonstrated actual bias and broke the confidence of the private sessions by telling me about something that had been discussed in conference with the other side. Now I am wary of what I say to mediators. I have lost confidence in the integrity of the process.²¹⁹

This comment demonstrates the importance of quality control in respect of such issues, because trust is such a fundamental aspect of the mediation process.

²¹² Schildt, Alfini and Johnson (1994), above n28, 29-31.

²¹³ Lawyers 18 and 35.

²¹⁴ Lawyers 4, 17, 35 and 39.

²¹⁵ Lawyers 3 and 21.

²¹⁶ Lawyers 3 and 31.

²¹⁷ Lawyers 10 and 32.

²¹⁸ Lawyer 3 and 5.

²¹⁹ Lawyer 3.

The expectations expressed by the lawyers were that mediators ought to be unbiased, protect the confidentiality of private sessions, prepare adequately for the mediation and be trained in terms of management of the mediation process. These expectations accord with expectations about the appropriate role of the mediator that transcend the distinctions between different mediation purposes and practices. They are fundamental aspects of a mediator's role.²²⁰ The interview responses, although scant in number, do indicate that some pressure to settle will be welcomed, provided that lawyers also perceive that the mediator conducts the process fairly.

4.2.3 Influence on the content

According to the process-oriented models of mediation, mediators strive to support the disputants to determine and make decisions about the content of mediation and do not interfere. There is widespread debate within the mediation community about the appropriateness or otherwise of mediator advice or evaluation of mediation content.²²¹ Nonetheless, mediator evaluation is a fundamental part of expert evaluation, wise counsel and tradition based mediation models. In these models the mediator's opinion is welcomed by parties to assist them to make informed decisions.

Research tends to indicate that both parties and lawyers accept mediator intervention in the content of mediation through evaluative techniques. For example, Goldfien and Robbennolt's law student participants demonstrated moderate preferences for mediators who give their own opinion about the strengths and weaknesses of the

²²⁰ See *The Practice Standards* (2007), above n125.

²²¹ See Chapter 2 [3.3.4].

case.²²² Eighty seven percent of lawyers in the Missouri Supreme Court thought that the mediator should know how to value a case.²²³ McAdoo and Welsh found that clients appreciate mediator evaluation and seem to appreciate mediators' help in achieving outcomes that are consistent with the rule of law.²²⁴ Wissler found that mediator's evaluation of the case contributed to both party and lawyer perceptions of fairness and did not make parties feel more pressured to settle.²²⁵ However, if mediator intervention in content extended to the recommendation of a particular settlement, parties felt more pressured to settle and viewed the mediation process as less fair.²²⁶

Advisory role

In the present study, thirty nine²²⁷ legal practitioners were asked 'Should a mediator ever advise disputants about the value of a claim or the likely result if the matter proceeded to trial?' This question reflects the debate within mediation literature about whether or not mediators ought to evaluate or should restrict their role to managing the process. One third (N=13 out of 39) of respondents said 'no.'²²⁸ The other two-thirds (N=26) of the respondents indicated that there were some circumstances in which mediators should evaluate the merits of a case. Notwithstanding the small sample size, the division one-third to two-thirds of opposing views demonstrates a diversity of opinions within lawyers operating within

²²² Goldfien and Robbennolt (2007), above n183, 297.

²²³ McAdoo and Hinshaw (2002), above n10, 524.

²²⁴ McAdoo and Welsh (2004-2005), above n101, 423.

²²⁵ Wissler (2002), above n30, 688.

²²⁶ Wissler (2002), above n30, 688.

²²⁷ Not all legal practitioners were asked all of the questions in the interview schedule. There were a number of reasons for these omissions. See further Chapter 3 [4.1].

²²⁸ Lawyers 10, 12, 15, 16, 20, 21, 23, 24, 25, 35, 36, 38 and 40.

the Supreme Court's programme. Further analysis of comments made in support of the 'yes' and 'no' responses demonstrates further complexity and diversity of views.

When evaluation is appropriate

There was a follow up question inviting practitioners to name the circumstances in which it would be permissible for a mediator to evaluate a claim. The cited circumstances ranged from 'always'²²⁹ to specific limited circumstances. An example of respondents who saw the mediator's role as requiring some evaluation 'always' was:

Always should. I'm sure that there would be lots of lawyers who would disagree but I think that it valuable for parties to hear it from the conciliator in private session. Not in joint session where all the parties are available, but I think that a conciliator who can't express their view isn't assisting in reaching a settlement in commercial matters.²³⁰

Each of the legal practitioners who said that mediators should 'always' give an evaluative opinion qualified their response in some way. The lawyer above stated that opinions should only be given in private sessions.²³¹ Other qualifications were that the mediator should have the requisite legal skills and knowledge on which to base an opinion²³² and that the mediator needs to have prepared adequately to form an opinion about quantum.²³³ One lawyer commented that mediators should give an alternative point of view to parties who might not otherwise consider particular

²²⁹ Lawyers 8, 11, 27, 33 and 41.

²³⁰ Lawyer 8.

²³¹ This qualification was also made by Lawyer 33.

²³² Lawyer 11.

²³³ Lawyer 33.

points, but that they should be subtle about the way in which they communicate their opinion rather than giving explicit advice.²³⁴

There was a range of circumstances identified by the remaining twenty-one legal practitioners as being determinants of the appropriateness of mediator evaluation. Those circumstances included the extent of legal experience that the mediator had,²³⁵ mediator skill²³⁶ and lawyer skill.²³⁷ Some practitioners believed that it was appropriate for mediators to evaluate the strengths and weaknesses of a case for the purpose of reality testing.²³⁸ Others stated that a mediator should qualify that the evaluation was only an opinion and was not determinative of the Court's outcome.²³⁹ One practitioner stated that it was appropriate for mediators to give an opinion about liability but not about quantum.²⁴⁰

When asked about any further comments in relation to the Court's mediation programme, four lawyers were of the opinion that there was a need for more evaluation of the merits of a case by the mediators.²⁴¹ For example:

I'd probably like to see some, it's not mediation, but where the mediator actually expresses a view about the case. I'd like to see more of that, because I think that's then a safeguard to inappropriate resolution of cases. At the moment the mediation, it's purely a mediation where the mediator is supposed to remain neutral. If they express a view about the case I think that the next step in the mediation process ought be experienced mediators who are experienced

²³⁴ Lawyer 27.

²³⁵ Lawyers 4, 5, 7, 9, 14, 18, 23, 28, 29 30, 31 and 39.

²³⁶ Lawyer 6.

²³⁷ Lawyer 5.

²³⁸ Lawyers 22, 26 and 42.

²³⁹ Lawyers 13, 14, 18, 19, 30, 31, 32, 34 and 37.

²⁴⁰ Lawyer 17.

²⁴¹ Lawyers 8, 22, 27 and 34.

civil litigation people who can actually express a view. Not binding of course. Some of the mediators or one in particular does do that on occasions and I think it is useful.²⁴²

The finding that the majority of interviewees support mediator evaluation of some kind is consistent with previous research findings that lawyers appreciate mediators who can value cases.²⁴³ Welsh suggests that lawyers value mediator evaluation because it provides a reality check for disputants.²⁴⁴ Furthermore, Kichaven, a lawyer who promotes mediation advocacy, asserts that 'good' mediators understand that getting a lawyer's '...good advice through to their own clients ... is, in fact, the essence of the job.'²⁴⁵

When evaluation is inappropriate

There were, however, a small number of contrasting views expressed, which should be taken into account and which demonstrate that there is not universal agreement that the mediators ought to evaluate more than they do. Two practitioners thought that the mediators ought to do less case evaluation in the Supreme Court of Tasmania's programme.²⁴⁶ In the following example the opinion was that the existing mediators are not qualified to evaluate:

There is not much experience in commercial law within the mediators. If they don't try to impose their own solutions then that's not a problem.... If mediators are going to become involved they can mislead the parties. On the mainland they use barristers and retired judges who have dealt with the legal issues. The disputes are in their area of expertise. It is okay for mediators to comment there.²⁴⁷

²⁴² Lawyer 34.

²⁴³ Goldfien & Robbennolt (2007), above n183, 314. See especially listed citations at their n208.

²⁴⁴ Welsh (2004), above n139, 590.

²⁴⁵ Jeff Kichaven, *Mediation Advocacy: The State of the Art* (2003) Mediate.com <<http://www.mediate.com/pfriendly.cfm?id=1821>> at 6th March 2006.

²⁴⁶ Lawyers 3 and 18.

²⁴⁷ Lawyer 18.

Mediators who evaluate ought to understand the legal arguments, be able to assess the merits of the cases and to offer an opinion regarding the appropriate settlement ranges.²⁴⁸ The recognition that in order for mediators to evaluate, they need legal expertise, is perhaps the reason why five interviewees expressed the view that mediators ought to have greater legal expertise.²⁴⁹ For example:

...the right person being someone who has an excellent knowledge of the law, has an excellent understanding of the processes of the law. ... a trial lawyer basically, someone who has been there and also has a really good understanding of society and people in general. If you get people like that to fill the role, then that would improve the system.²⁵⁰

On the other hand, one practitioner stated that he was satisfied with the legal knowledge of the existing mediators.²⁵¹

I think that so long as the mediator has the ability to be flexible and to exude an independence in terms of the litigation and to a degree some wisdom that might be perceived by plaintiffs at least to be quasi-judicial then I think that's about all we can expect of them.²⁵²

Whether or not these lawyers drew a conclusion that the legal knowledge of the mediators who practise within the Court's programme was adequate, they were all of the opinion that a degree of legal expertise is necessary in a mediator and that the mediator's legal opinion ought to be offered within the mediation process. There is some evidence that where they have a choice, lawyers tend to select experienced litigators to mediate in general civil cases.²⁵³

²⁴⁸ Welsh (2004), above n139, 589-590; Gordon, above n30, 228.

²⁴⁹ Lawyers 18, 25, 29, 30 and 34.

²⁵⁰ Lawyer 30.

²⁵¹ Lawyer 37.

²⁵² Lawyer 37.

²⁵³ Welsh (2004), above n139, 589-590; Gordon (1999), above n30, 228; Kimberlee K Kovach and Lela P Love, 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law*

At the other extreme of opinion, three interviewees recounted a 'worst' experience where the mediator gave a legal opinion.²⁵⁴ The objection to the giving of an opinion was that it was contrary to the opinion of the legal practitioner or wrong. For example:

...the mediator ineptly told the other side that in his view they would win and not only didn't they win, but they didn't ever win all the way to the High Court.²⁵⁵

Gordon has noted that lawyers tend to expect that the mediator will agree with their own assessment of the case rather than contradict them in front of their client.²⁵⁶

Dissatisfaction is likely to arise where a mediator provides an opinion that contradicts the legal advice that a lawyer has provided to their client. It will be particularly acute where the mediator provides an opinion that is later proved incorrect. Such dissatisfaction may be the reason for the 'worst' experiences that were offered.

The lawyers' comments during interviews exposed a diversity of opinion amongst the local legal profession about the appropriateness of mediator evaluation within the programme. That inconsistency suggests that there is a need for guidelines which clarify the appropriate role of the mediators who practice within the programme. This could involve formalisation of the different process models practised by each of the

Review 71, 96; Robert B Moberly, 'Mediator gag rules: Is it ethical for mediators to evaluate or advise?' (1997) 38 *South Texas Law Review* 669, 672; J Brad Reich, 'Attorney v Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation' (2002) 26 *Southern Illinois University Law Journal* 183 at his n18 citing McAdoo, 'A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practices in Minnesota' (1997) 31, 38.

²⁵⁴ Lawyers 12, 38 and 40.

²⁵⁵ Lawyer 38.

²⁵⁶ Gordon (1999), above n30, 228.

mediators working within the Court's programme.²⁵⁷ Such a distinction could inform the choice of mediator assigned to particular cases. These options are discussed further in Chapter 6.

4.3 The lawyers' role

There are disparate opinions within mediation literature about the appropriate role of lawyers in mediation. The lawyers' role varies depending on the context of the mediation.²⁵⁸ In court-connected mediation of general civil cases there is a tendency to focus on professional representation rather than the disputants themselves resolving the dispute.²⁵⁹ However, a primarily advisory role is encouraged and advocacy discouraged in some guidelines for practice.²⁶⁰ From this perspective, the lawyer's role is not usually to conduct the negotiations on behalf of the client. Exceptions to this general rule include where a disputant lacks the capacity to speak for themselves or to do so might expose them to inappropriate behaviour by the other disputant.²⁶¹ On the other hand, many legal practitioners promote strategic adversarial advocacy within mediation.²⁶² There is clearly a spectrum of potential roles for lawyers in mediation. As the discussion of lawyer views about their clients' role in mediation in [4.1] above demonstrated, there is a tendency for lawyers to

²⁵⁷ See Chapter 4 [5.3].

²⁵⁸ Walker (2007), above n101, 151.

²⁵⁹ Margaret A Shone, 'Law Reform and ADR: Pulling Strands in the Civil Justice Web' (Paper presented to the Australasian Law Reform Agencies Conference, Wellington, New Zealand, April 13-16, 2004).

²⁶⁰ Law Society of New South Wales (2007), above n78; Gerschman (2003), above n84; Boule (2005), above n125, 232-244; Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed, 2003) 150; Anne Ardagh and Guy Cumes, 'Lawyers and mediation: Beyond the Adversarial System?' (1998) (9) *Australian Dispute Resolution Journal* 72, 74; Sordo (1996), above n78, 24; Beckingham & Cyngler (1998), above n106.

²⁶¹ Rachael Field, 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participant who are Victims of Domestic Violence' (2004) 20 *The Australian Feminist Law Journal* 65.

²⁶² Caputo (2007), above n78, 86; Michael Redfern, 'Mediation and the Legal Profession' (2002) 13 *Australasian Dispute Resolution Journal* 15, 17; Spier (1999), above n89; Cooley (2002), above n80; Kichaven (2003), above n251.

prefer a spokesperson role in court-connected mediation. This has implications for the self-determinative potential of the mediation process.

A partial explanation for the role that lawyers tend to play in court-connected mediation is that mediation calls for participants to perform roles that are entirely different from the roles that are performed in traditional pre-trial and trial processes. Lawyers are accustomed to performing a strategic adversarial role in litigation. The opportunity for direct and active disputant participation that is provided in mediation is quite different from the role of the passive observer that clients usually adopt in litigation. Lawyers are accustomed to being the main participants in litigation and therefore it is understandable that many want to play the main part in court-connected mediation.²⁶³ One of the interviewees made the following comment:

Generally speaking I don't encourage people to say anything until such time as they're spoken to and then I warn them that they've got a dog and they shouldn't be barking themselves.²⁶⁴

Lawyers who consider that their job is to 'bark' for their clients are extremely unlikely to encourage their clients to 'bark' for themselves.

Lawyers perceive that their role in mediation includes a multitude of tasks, some of which are advisory, some of which require them to act as a negotiator or advocate. For example, McEwen et al's US research found that most of the lawyers interviewed for that study considered that their role included protecting against mediator pressures or unfair bargaining advantages by the other side.²⁶⁵ Macfarlane has identified that many lawyers now believe that there are discrete and different skills involved in mediation advocacy and it is not simply a matter of reproducing

²⁶³ Gordon (1999), above n30, 227.

²⁶⁴ Lawyer 25.

²⁶⁵ McEwen, Rogers and Maiman (1995), above n15, 1360.

traditional positional bargaining skills.²⁶⁶ However, she notes a lack of certainty about the role of the lawyer in the mediation context.²⁶⁷ It is perhaps this uncertainty that contributes to many lawyers, such as those in Gordon's study, adopting a traditional adversarial advocate's role in mediation.²⁶⁸ Lawyers working in medical malpractice suits in Toronto identified that: partaking in tactical communication, obtaining strategic insight and influencing and managing disputant impressions by making representations, were core aspects of the lawyer's role.²⁶⁹ Divorce lawyers in Maine believed that mediation generally required them to recede into the background, serving as client advisors and supporters and only occasionally as advocates.²⁷⁰ Their role included that of rights-oriented advocate, advising about legal issues and protecting their client against loss of legal entitlements.²⁷¹

In the present study, thirty-nine interviewees²⁷² were asked to indicate 'Which of the following best describes the legal practitioner's role in court-connected mediation?' The options were 'advocate', 'advisor' or 'negotiator'. Only two respondents indicated that in their opinion the role of the lawyer in court-connected mediation is to advise only. Five of the thirty nine practitioners who answered this question (13%) were of the opinion that the lawyers' role is only to negotiate. No practitioners believed that the lawyers' role in court-connected mediation is to advocate only. These results, based on thirty-nine responses, show that the overwhelming majority

²⁶⁶ Macfarlane (2002), above n5, 299.

²⁶⁷ Macfarlane (2002), above n5, 299.

²⁶⁸ Gordon (1999), above n30, 227.

²⁶⁹ Relis (2009), above n141, Chapter 6.

²⁷⁰ McEwen, Rogers and Maiman (1995), above n15, 1371.

²⁷¹ McEwen, Mather and Maiman (1994), above n23, 163, 171.

²⁷² The first three interviewees were not asked this question, which was developed after reflection upon the initial interviews.

of Tasmanian lawyers who were interviewed do not consider that the lawyers' role in court-connected mediation is restricted to that of advisor only.

Notwithstanding the moderate sample size, it is useful to reflect upon the proportion of respondents who chose each aspect of the lawyers' role in mediation. Looking at each aspect in turn, 77% (N=30) of the thirty nine legal practitioners were of the opinion that the legal practitioner's role includes an element of advocacy, 82% (N=34) believed that legal practitioners ought to provide advice during mediation and 97% (N=38) believed that the legal practitioner's role includes that of negotiator. Most of the lawyers (N=27, 69%) believe that their role in court-connected mediation includes elements of advisor, advocate and negotiator. Lawyers expect to act as agents for their clients by negotiating or advocating on their behalf. This reflects a perception that their role is to represent their clients throughout all aspects of litigation, including during court-connected mediation. This mixture of roles is consistent with the lawyers' usual mix of tasks in representing their clients in litigation.

The expectation that lawyers will speak on their clients' behalf during mediation may also be affected by the nature of the relationship between lawyers and their clients. Coben asserts that many clients do not want to be active participants in the resolution of their disputes, which is why they engage a lawyer to act on their behalf.²⁷³ It is possible that some clients expect to be relieved of the responsibility of being active participants in the resolution of their dispute once they have secured legal representation. Although the promotion of self-determination may theoretically

²⁷³ James R Coben, 'Summer Musings on Curricular Innovations to Change the Lawyer's Standard Philosophical Map' (1998) *Florida Law Review* 735, 741.

maximise disputant responsibility, some disputants may prefer not to take responsibility for the resolution of their dispute. No empirical evidence has been identified that confirms anecdotal claims such as Coben's and the disputant perspective is outside the scope of this empirical research. Furthermore, several empirical studies of disputant satisfaction have concluded that disputants rate direct participation and adequate speaking opportunities highly in respect of their satisfaction with the mediation process.²⁷⁴ Other research showed mixed effects of direct disputant participation.²⁷⁵ It is possible that litigants, whose conflict management strategy has brought them to the apex of the conflict resolution pyramid, are more likely than the general population to want to avoid active participation in the resolution of their dispute. The advice of their lawyer may also contribute to such expectations.

4.4 Summary of lawyers' expectations about the roles of participants in mediation

In relation to their clients, most lawyers are cautious about direct disputant participation in mediation. They tend to discourage their clients from participating directly, to manage their clients' participation and to decide for their clients what the appropriate degree of disputant participation is in a particular case. Furthermore, the legal profession is split one third to two thirds on the issue of mediator evaluation, with most considering evaluation to be appropriate in some circumstances. This opinion impacted on expectations about the appropriate qualification of mediators.

²⁷⁴ Boule (2005), above n125, 597-598; Bartlett (1993), above n3; Delaney and Wright (1997), above n101; Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92_text.html>. For further references see Boule (2005), above n125, Ch 16 his n13 and 15.

²⁷⁵ Wissler (2002), above n30.

Most lawyers believe that their own role in court-connected mediation includes elements of advisor, advocate and negotiator. Only two agreed that their role was only to advise. On the other hand, thirty eight of thirty nine (97%) believed their role included that of negotiator and thirty (77%) believed that their role included advocacy.

An eclectic range of views is demonstrated by the interview data. This raises the issue of whether or not there is sufficient clarity of expectation about the appropriate roles of participants in the court-connected mediation programme. Although a diversity of practices is not necessarily problematic, a diversity of expectations does increase the opportunity for dissatisfaction or confusion. These issues are explored further in Chapter 6.

5 Lawyers' perspectives of the goals of court-connected mediation

The lawyers' interview responses that relate to the mediation goals of satisfaction of a broad range of client interests, the application of the law and settlement are considered here.²⁷⁶ Satisfaction is related to the priority of individual preferences. The application of the law and settlement are primary institutional aims. The discussion here provides evidence addressing each of the hypotheses relating to responsiveness, self-determination and cooperation. Each of these core features varies in degree, depending partly upon the overarching goal of the mediation. Therefore, lawyers' perspectives of the goals of the programme are influential on the degree to which the core features of mediation are promoted within the programme.

²⁷⁶ These mediation goals were considered from the theoretical perspective in Chapter 2 [3.2].

5.1 The goal of satisfaction of a broad range of interests

5.1.1 Extra-legal benefits of mediation

The interview data was interrogated to determine whether or not legal practitioners identified consequences of mediation that related to the satisfaction of disputants' individual needs and preferences. This interrogation was undertaken in order to identify the extent to which legal practitioners nominated disputant satisfaction as a potential outcome of court-connected mediation. It was expected that some lawyers would report satisfaction as an advantage of mediation. The increased opportunity to resolve a dispute in a way that is satisfactory to the disputants was recognised by some of the lawyers in Saville-Smith and Fraser's New Zealand study.²⁷⁷ In Gordon's US research 35% (N=148 of 424) of the lawyers she surveyed thought that the most important result of a mediation was the maximisation of the clients' satisfaction.²⁷⁸

Research indicates mixed lawyer perspectives of the discussion of non-legal matters during the mediation process. Lawyers do not tend to choose mediation to achieve extra-legal outcomes, particularly in court-connected contexts.²⁷⁹ Roughly one quarter (of 88) of the divorce lawyers interviewed in Maine identified the opportunity to express strong emotion as a benefit of mediation, whereas five lawyers expressed frustration at having to be present whilst non-legal matters were discussed.²⁸⁰ Four of the divorce lawyers counselled their clients against expressing

²⁷⁷ Saville-Smith & Fraser (2004), above n4, 27.

²⁷⁸ Gordon (1999), above n30, 230.

²⁷⁹ McAdoo and Welsh (2004-2005), above n101, 420.

²⁸⁰ McEwen, Mather and Maiman (1994), above n23, 170-171.

their emotions during the mediation.²⁸¹ Ten reported that intricate non-legal matters were often resolved during mediation, meaning that mediation agreements were often more complex than agreements made outside the process.²⁸² Commercial lawyers in Toronto and Ottawa aimed to achieve business solutions and commercially viable ends to litigation; which sometimes included extra-legal outcomes such as business relationships, completion of a deal, agreement to vacate, or the structuring of settlement to maximise tax advantages.²⁸³ These kinds of outcomes were dependent upon direct participation by the commercial clients.²⁸⁴

Relis' research involving medical malpractice claims paints a stark picture of the disjunct between lawyer and party perspectives about the goals of the mediation process.²⁸⁵ There, defendant physician lawyers maintained that the disputes were only about money, defendant hospital lawyers said the disputes were mostly about money and plaintiff lawyers said the disputes were mostly about money, but also other things.²⁸⁶ Thirty three percent of plaintiff lawyers thought that their clients only wanted money. These views can be contrasted with plaintiff views, who said the disputes were not about money, but principles. Mediation objectives of plaintiffs and their lawyers diverged significantly.²⁸⁷ Clearly, if lawyers do not have an accurate understanding of their clients' aim, they are unlikely to pursue it.

²⁸¹ McEwen, Mather and Maiman (1994), above n23, 170-171. See also Gerschman (2003), above n84, 10.

²⁸² McEwen, Mather and Maiman (1994), above n23, 170-171.

²⁸³ Macfarlane (2002), above n5, 268-269.

²⁸⁴ Macfarlane (2002), above n5, 268-269.

²⁸⁵ Relis (2009), above n141.

²⁸⁶ Relis (2009), above n141, Chapter 2.

²⁸⁷ Relis (2009), above n141, Chapter 2.

5.1.2 Satisfaction with the outcome

In the present study, there were a small number of references to satisfaction during the interviews. The goal of satisfaction may be met when disputants are satisfied with the outcome of the mediation process. One lawyer referred to a settlement proposal developed in mediation that was satisfactory to all parties. The proposal was suggested by the mediator:

[Mediator] was able to, because of his seniority and experience and personality too I guess, he was able to say 'I think that you should be doing this' or 'I think that you're asking too much or you're being too mean' and people, the client would listen so that was good, especially if you thought that the other side were being difficult. I remember one difficult case I had where we knew we could settle but we were just having some trouble settling it and he came up with a scheme whereby he knew everyone could go away happy....That's an advantage of having a particular mediator there.²⁸⁸

One lawyer reported that an advantage of the court-connected mediation process is that it meets the interests of the disputants.²⁸⁹ Two referred to the advantage that disputants are happy with mediated outcomes.²⁹⁰

... the parties who attend mediations are happy with the outcomes, completely happy, both sides are completely happy, then it really doesn't matter if the judges sit up there all year and do no litigation. Because they're there to serve the people as it were and if the people are happy through a process that stops outside the court door, then that's fine. I'd be very surprised if a judge said otherwise.²⁹¹

²⁸⁸ Lawyer 33.

²⁸⁹ Lawyer 15.

²⁹⁰ Lawyers 32 and 40.

²⁹¹ Lawyer 32.

Four practitioners emphasised that an advantage of mediation is that mediation outcomes can be more satisfactory than outcomes that are imposed.²⁹²

I think in any litigation no-one's ever going to be happy so if you can get an outcome which satisfies everybody then you've done a good job and eliminated the risk. In trying to get that satisfaction sometimes you can really highlight the risk.²⁹³

... the real benefit though is that there's no doubt that a dispute which has been mediated to use a phrase that I don't like to use, but the parties can come away with some sense of ownership of that rather than having a solution imposed on them by the court.²⁹⁴

The second lawyer somewhat reluctantly referred to disputant 'ownership', which is promoted through both responsiveness (disputants define the content of discussions) and self-determination (disputants decide).

In relating advantages of mediation, only a small number of lawyers mentioned satisfaction-related advantages. This indicates that the satisfaction of a broad range of interests is not a significant purpose of mediation from the legal perspective. The scarcity of references to satisfaction aims or benefits as an advantage or gain from the programme supports a conclusion that they were not high in the consciousness of the forty-two interviewees.

5.1.3 Recognition of satisfactory outcomes when they were achieved

However, there was evidence that where court-connected mediation delivered satisfaction in the sense of the individual disputants' feeling satisfied, this outcome was valued highly by the lawyers involved. Fourteen of the thirty-nine²⁹⁵ legal

²⁹² Lawyers 6, 32, 35 and 42.

²⁹³ Lawyer 6.

²⁹⁴ Lawyer 35.

²⁹⁵ Not all legal practitioners were asked all of the questions in the interview schedule. There were a

practitioners (36%) who described their 'best' experience at mediation during the interviews recalled an experience that promoted satisfaction related attributes. Six of these practitioners reported mediations where the client was happy with the outcome.²⁹⁶ For example:

It really is a great experience to close it with everyone being happy, even if you're acting for an insurance company. I mean mediations are really very backslapping experiences if you do them correctly.²⁹⁷

I just think that when you come out of a mediation with a client who's been very stressed, these are often personal injuries cases, where they really feel that everything's been done for them that could have been done, and that they don't regret the mediated settlement, they don't think that they've got less than they were entitled to, they feel that it's a fair outcome. They feel that they can get on with their lives without going through the process of a trial.²⁹⁸

Settlement where it was unexpected was reported as a 'best' experience by five interviewees.²⁹⁹ Examples of these responses were:

Where the parties think they're intractably apart, but if it's an open and frank mediation process there's a realisation that there are bridges that can be bridged, and outcomes are reached as a result.³⁰⁰

...something that achieved a settlement where I didn't think one was possible ... everyone did have their say ... it enabled the air to be cleared...³⁰¹

This report refers to the benefits of direct participation by interested parties. The opportunity for a voice was embraced.

number of reasons for these omissions. See further Chapter 3 [4.1].

²⁹⁶ Lawyers 4, 13, 19, 21, 25 and 28.

²⁹⁷ Lawyer 28.

²⁹⁸ Lawyer 21.

²⁹⁹ Lawyers 10, 15, 29, 37 and 41.

³⁰⁰ Lawyer 29.

³⁰¹ Lawyer 41.

Three interviewees told stories about the satisfaction of non-legal interests of the disputants through the mediation process.³⁰² These were the restoration of relationships and departing from a strictly legal perspective of the dispute.

...the results genuinely suited both parties to the point where at the end of it the parties, who were effectively mortgagor and mortgagee and the mortgagee was attempting to push the mortgagor out, in the end they discovered that they had a common interest in something and became good friends.³⁰³

This was an outcome that derived from attention to non-legal interests and was an inventive outcome that would not be available to a court.

The 'best' experiences described, although based on a moderate sample size of thirty-nine, nonetheless demonstrated that when the satisfaction of their clients' individual non-legal interests has been achieved, some lawyers valued that type of experience enough to recall it to be a 'best' experience at mediation. Furthermore, there were a smaller number of satisfaction related advantages of mediation identified. However, the lawyers' perceptions that a settlement outcome was appropriate did not necessarily relate to the degree of satisfaction that their clients had with the settlement outcome. For example, the following lawyer equated a reasonable outcome as one where no-one was happy:

The real benefit is that the disputes are diffused and people go away - generally speaking a good result at a mediation leaves both parties looking relieved but not happy, you know, so if one of them walks out smiling then you know that the settlement was on terms that they regard as being extremely favourable. It's the ones where people walk away begrudgingly

³⁰² Lawyer 8, 38 and 41.

³⁰³ Lawyer 38.

accepting that it's all over that you know it's about right. Because neither of them is entirely happy, both of them have had to compromise their expectations.³⁰⁴

This type of outcome is the sort of outcome that would be expected from a distributive bargaining process, which was reported to be a common style in the Court's programme.³⁰⁵ Such a lose/lose outcome is the antithesis of the satisfaction story which seeks win/win outcomes.³⁰⁶ It was, however, an isolated comment.

The evidence demonstrates that some lawyers value disputant satisfaction when it is achieved in mediation. However, satisfaction does not appear to be actively sought through the court-connected mediation process very often. If the predominant goal of the process was to satisfy the individual needs and interests of the clients, then disputants would actively and directly participate, their individual needs and interests would be prioritised over legal norms where they conflicted, disputants would control the content of the mediation and the style of bargaining would be interest-based.³⁰⁷ These are not predominant features of court-connected practice in the Supreme Court of Tasmania.³⁰⁸ The interviews do not demonstrate that lawyers consider that disputant satisfaction of a broad range of disputant interests is a primary purpose of the mediation process. This is reinforced by the examination of the interview responses which related to other mediation goals. However, lawyers are not blind to the individualised benefits that mediation sometimes delivers. There was some demonstration that lawyers appreciated outcomes that satisfied a broad range of their clients' needs.

³⁰⁴ Lawyer 35.

³⁰⁵ Chapter 4 [5.2].

³⁰⁶ See Chapter 2 [3.2.1].

³⁰⁷ Chapter 2 [3.2.1].

³⁰⁸ Chapter 4.

5.2 The goal of achieving justice through the application of the law

One of the Court's obligations is to apply the law to the determination of disputes.

When mediation occurs within the justice system, it is a court-sponsored process and the Court has some obligation to ensure that justice is being achieved.³⁰⁹ This is usually done by relying upon procedural rules to ensure that the process is fair.³¹⁰

Macfarlane has identified that lawyers tend to default to rights and a belief in justice as process when measuring justice.³¹¹ Consequently, '[l]awyers' faith in justice as process is faith in a rights-driven, truth seeking model of process.'³¹² Lawyers value mediation for the procedural fairness, legal outcomes and reality check that it provides.³¹³

Lawyers analyse their clients' disputes in terms of the legal issues as part of their fundamental advisory role. Research has demonstrated that for some lawyers, the primary purpose of mediation is to determine the worthiness of the legal case and they prefer to negotiate solely in terms of legal rights and liabilities.³¹⁴ They are comfortable with negotiations which take place in the shadow of the law, a familiar area of expertise for them.³¹⁵

The preference to apply legal norms to disputes may conflict at times with disputants' preferences. For example, Welsh found that parties wanted their own,

³⁰⁹ Chapter 2 [2.5].

³¹⁰ Chapter 2 [2.5.2]; Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008), 56.

³¹¹ Macfarlane (2008), above n310, 57.

³¹² Macfarlane (2008), above n310, 57.

³¹³ Schildt, Alfini and Johnson (1994), above n28, 34; Wissler (2002), above n30, 664.

³¹⁴ Macfarlane (2002), above n5, 285; McAdoo and Welsh (2004-2005), above n101, 420; Gerschman (2003), above n84, 9.

³¹⁵ McAdoo (2002), above n55, 405; McEwen, Mather and Maiman (1994), above n23, 162.

rather than externally imposed, norms to be applied to their dispute.³¹⁶ Where lawyers are the dominant participants in mediation, the result is that legal topics dominate the negotiations, increasing the likelihood of the imposition of externally imposed norms to disputants' disputes.³¹⁷ The connection with the court also increases this likelihood.

Lawyers have duties to the courts in relation to the administration of justice which encourage them to pursue outcomes in accordance with the law. They may have concerns about the ability of mediation to safeguard against 'unjust' outcomes. For example, some of the New Zealand lawyers interviewed by Saville-Smith and Fraser identified the potential disadvantage of dispute resolution failing to deliver a 'sound' or 'fair' outcome.³¹⁸

The findings from previous research support the hypothesis that court-connected mediation will be focused on legal rights. The interview data was also analysed to determine the degree to which lawyers believe that mediation ought to deliver substantive justice by applying the law to disputes.

Many interviewees identified the consideration of the legal case and the pursuit of outcomes in accordance with legal standards as purposes of mediation. Some of the stories that were told during the interviews demonstrated how some lawyers balance their competing obligations of promoting 'justice' through the application of the law

³¹⁶ Welsh (2004), above n139.

³¹⁷ Gordon (1999), above n30, 227.

³¹⁸ Saville-Smith & Fraser (2004), above n4, 31; see also McEwen, Mather and Maiman (1994), above n23, 162.

and 'fearless advocacy.' The balance between these obligations affects the degree to which the purpose of applying the law is promoted.

5.2.1 Consideration of the legal case

It was clear from the interviews that for many lawyers, court-connected mediation provides an opportunity to consider the legal case from a range of perspectives.

Consideration of the legal case includes information gathering, listening to the opposing arguments and presenting the client's own legal arguments.

Information sharing

The opportunity to gather information was recognised by some lawyers as an advantage of mediation:

There are a number of purposes when you are acting, particularly in a personal injuries action. One of the problems that you will always have in litigation is finding out information. Sometimes you might choose to have a mediation conference, registrar's conference, purely for finding out information.³¹⁹

Gathering information is not necessarily a competitive strategy, but could be part of a cooperative negotiation strategy. The cooperative sharing of information is an opportunity provided in mediation. Information may enable a person to understand the other person's perspective, or to reassess their own legal case and the strengths and weaknesses of the legal arguments. The following practitioner reported the advantage of exchanging information in an open and cooperative way in mediation:

The other benefit of it is both parties sit down, and most practitioners on the other side that I've dealt with seem to take the same approach, is you put all your cards on the table, so

³¹⁹ Lawyer 41.

there's no ambushes as such, you know exactly what they think the case sits at, they know what you think the case sits at and it really helps in narrowing the issues if it eventually is going to go to trial.³²⁰

The open, cooperative approach is useful in building an understanding of the legal case and can be contrasted with the closed, competitive approach that is preferred in traditional adversarial litigation.

Mediation provides an incentive to share more information than might otherwise be revealed:

It forces the defendant to come along and put their cards on the table, where the way the rules are all the defendant really has to do is deny and you don't have to know why necessarily, until you get to trial.³²¹

In other words, court-connected mediation can provide a constructive opportunity to share information prior to trial. This improves the efficiency of the litigation process and promotes settlement that accords with legal principles.

The opportunity to share information can assist the mediation process by giving each participant better insight into the dispute as a whole. By meeting face to face in the 'without prejudice' forum that mediation provides, the expensive and often cumbersome process of discovery can be streamlined. Court-connected mediation is therefore an efficient way to share information that must be exchanged in any event prior to trial. The information can be explained or presented in such a way that the impact of potentially damaging material can be minimised.³²²

³²⁰ Lawyer 10.

³²¹ Lawyer 15.

³²² Cooley (2002), above n80, [2.4].

However, information gathering could also be a 'fishing expedition' for material that advances the adversarial interests of the client. This use of mediation is contrary to the spirit of cooperation that is fundamental to mediation. The following practitioner considered that the use of mediation as a fishing expedition was a disadvantage of court-connected mediation:

Where you are dealing with people who don't go into it with the right attitude and they use it as a fishing exercise. And of course when you know that type of practitioner is on the other side you have to say to your client, who is looking forward to this practical option to stop going to court - well there's a bit of a caveat on that Mr Smith because we've got a so and so on the other side who is not going to approach it in the right manner. And unfortunately there's no-one there who can force him to do it. So I'd like to see if possible some sanction imposed upon people who don't play by the rules.³²³

Some lawyers perceived risks inherent in information sharing in mediation. They referred to the risks of adopting a cooperative, open approach. Thirteen of the forty two interviewees (31%) identified the exposure of weaknesses in their arguments or cases as a potential disadvantage of mediation.³²⁴ Some examples of those responses are as follows:

The disadvantage is that sometimes something gets divulged that you didn't intend to. And more so if you're acting for a plaintiff.³²⁵

I think that unless you are careful it's possible to give away a strategic advantage by disclosing something in the hope of facilitating settlement then and there which doesn't occur and which thus gives your adversary some ammunition in terms of forewarning that he or she wouldn't otherwise have.³²⁶

³²³ Lawyer 32.

³²⁴ Lawyers 6, 8, 9, 10, 13, 18, 20, 26, 27, 31, 33, 37 and 41.

³²⁵ Lawyer 31.

³²⁶ Lawyer 37.

However, four of the practitioners who referred to the divulging of 'too much' information at mediation to be a potential disadvantage qualified their response by stating that they preferred to be open and transparent in mediation notwithstanding that risk.³²⁷ The following is an example of the qualification:

The only disadvantages would be from a strategic point of view where if you think your matter's possibly going to go to trial, it's revealing a bit of your hand before you get to trial. But from my own perspective, I don't worry about that. The ultimate aim, and I suppose I have a personal view that mediation is the best way to deal with litigious matters, so I just go in there and you just put your cards on the table and more often than not you're going to get settlement.³²⁸

A further qualification of the concerns about exposing the weaknesses of the legal case is that nearly half of the interviewees who expressed this disadvantage (N=6 of 12) also expressed the opportunity to cooperate as an advantage of mediation.³²⁹

Opportunity to hear the other legal arguments

The second aspect of considering the legal case is the listening opportunity provided by mediation. The opportunity to hear the arguments of the opposing side was mentioned by some practitioners as a benefit of mediation. This listening opportunity is not necessarily a mutual exchange. Two practitioners stated that the exposure of a client to the risks and opposing legal arguments was the main benefit of court-connected mediation.³³⁰ The opportunity for lawyers to hear each other's legal arguments was also a benefit that was mentioned. For example:

³²⁷ Lawyers 10, 13, 26 and 33.

³²⁸ Lawyer 26.

³²⁹ Six lawyers mentioned both. Lawyers 6, 10, 18, 20, 31 and 33.

³³⁰ Lawyers 17 and 31.

...the advantage from the lawyer's perspective is that depending on how your adversary plays it, you'll usually get for free an analysis of the defendant's case, so you get a bit of a 'heads up' to an extent, about areas or issues which you haven't thought of and then the opportunity therefore to go and repair that if it doesn't resolve.³³¹

This comment reflects an adversarial use of the listening opportunity provided by mediation. The adversarial promotion of the client's legal case is considered below at [5.2.3].

The opportunity to present legal arguments

The third way that mediation can contribute to the consideration of the legal case is by providing an opportunity to present the case to the other disputant. For some legal practitioners court-connected mediation presents an opportunity to present their own adversarial arguments to the other side.³³² For example:

It enables me to, perhaps indirectly, but nonetheless to speak with the opposing client and explain to them what I think are the shortcomings in their case, and quite often the unrealistic expectations that they have in relation to the matter. That's probably what I would see as the big advantage of mediation.³³³

The value of the opportunity to present the legal arguments is that it can modify the expectations of the other disputant. In other words, they might be persuaded to change their view.

The best one was where I went through every particular of the negotiation and explained why it couldn't succeed. The matter didn't resolve but this approach did lower the plaintiff's expectations and also was a classic demonstration of the value of preparation and understanding the issues.³³⁴

³³¹ Lawyer 20.

³³² Seven practitioners (17%) expressed such an advantage. Lawyers 5, 8, 9, 20, 28, 32 and 41.

³³³ Lawyer 5.

³³⁴ Lawyer 22.

All of the examples outlined above demonstrate that many lawyers use mediation as an opportunity to consider the relative strengths and weaknesses of the legal cases by information gathering, listening and presenting. These opportunities are used to consider the legal issues rather than the individual needs of the disputants. There was some recognition of the risk of over-exposure of the clients' case that may be a consequence of cooperative information sharing. However, these risks were outweighed by the benefits. The responses demonstrated clearly the priority of legal issues in court-connected mediation, which is used to pursue settlement and to progress the litigation process. The purpose of settlement of the legal case is high in the consciousness of lawyers.

5.2.2 Outcomes in accordance with legal standards

If lawyers believe that the primary purpose of court-connected mediation is to achieve outcomes in accordance with legal principles, then they may promote that purpose not only by discussing the relative merits of the legal arguments, but also by actively pursuing outcomes that accord with the likely legal outcome.

Pursuit of 'just' results

It was clear that many of the interviewees considered that the primary purpose of the mediation process was to pursue outcomes that conformed to objective legal standards. Eleven of the thirty nine legal practitioners who answered the question (28%) reported that their 'best' experiences were where an outcome was agreed at mediation that reflected a 'just' result.³³⁵ Three of the interviewees relayed stories of

³³⁵ Lawyers 6, 9, 14, 18, 19, 28, 30, 34, 39, 40 and 41.

careful consideration and debate of the legal issues as best experiences that resulted in the achievement of just results.³³⁶ For example:

...both practitioners knew their job really well ... both practitioners were on top of their cases and on the law, and therefore the arguments were well thought out ... The parties had been well briefed. The defendant was not being obstructionist ... The plaintiff did not have unreasonable expectations and was not so emotionally attached to their case that they weren't about to make sensible and logical decisions ... This was a case where the mediator was there to offer along the lines 'they've got a really good point with this' ... I remember thinking at the end of that that everyone had done a really good job in getting a good result for their clients and that the mediator had earned their fee.³³⁷

For eight legal practitioners, the measure of justice was whether the result fell within their own assessment of the parameters of fairness.³³⁸ For example:

...the best experience is getting that result which you consider is in the parameters of fairness for the client.³³⁹

I think there are other rewarding experiences such as when I have said to a client 'I think this is worth \$136,000' and we have walked out at \$136,000. You know when you are on the mark you are happy.³⁴⁰

My best experience is to settle something when I've anticipated correctly the range. There's nothing worse than to go to a mediation and to find that you are so far apart that either you or your opponent is completely off the ball, and you can have doubts about that. So you could say by cheating somebody and by giving them less than you were ever going to give them, but I think the best thing is to, having made your own assessment, to see the thing resolve in that area.³⁴¹

³³⁶ Lawyers 9, 19 and 30.

³³⁷ Lawyer 30.

³³⁸ Lawyers 6, 14, 18, 28, 34, 39, 40 and 41.

³³⁹ Lawyer 6.

³⁴⁰ Lawyer 41.

³⁴¹ Lawyer 39.

These responses demonstrate that many lawyers are clearly focused on the potential for mediation to achieve outcomes for their clients that are in accordance with legal standards.

Reality testing strengths of legal claims

A related use of court-connected mediation is to persuade a client of the limitations of the outcomes that could be achieved within the legal system. Two interviewees stated that one of the advantages of mediation is the ability to convince a disputant that a particular outcome was the best that they could expect from the legal system.³⁴² For example:

Here sometimes you have both people walk away and they both think they've been stiffed, but sometimes you have people walk away and think 'well I'm happy enough with that at the end of the day.' Especially once the cold light of trial has been pointed out to them. I suppose with mediation they actually feel that they've had a voice, that someone has listened to their grievances, considered that, given an opinion and offered them sympathy but then said 'but hang on.' For example, in a personal injuries matter 'Oh, I want \$500,000.' 'Well, you're not going to get that at the end of the day, I know \$500,000 won't properly, even \$2 Million wouldn't adequately compensate you, but at the end of the day we look at what the courts do.' Just things like that and they'll suddenly put it in perspective, I suppose. It's one thing hearing it from their own lawyer, it's one thing hearing it from the lawyer who's acting against their interests, but hearing it from a mediator who says 'well look I've got no concern about the outcome,' I think that it empowers them I suppose. And it gives them certainty and what the Americans call closure.³⁴³

This practitioner valued and appreciated mediator evaluation of the legal merits of the respective cases and considered that disputants gained from hearing a third opinion about their matter. The comments reflect the value placed upon the

³⁴² Lawyers 13 and 42.

³⁴³ Lawyer 13.

opportunity to be heard, to listen to other points of view and the development of realistic expectations about the legally available outcomes. They are an important reference point for measuring the fairness of court-connected mediated outcomes.

Concerns about outcomes falling outside the legal range

The importance of arriving at solutions which fall within the range of likely legal outcomes was emphasised by lawyers' disapproval of occasions when outcomes were outside that range. Some lawyers reported instances where the mediation process resulted in outcomes that did not accord with legal standards. Thirteen of the forty two interviewees (31%) were concerned about inappropriate settlements being reached at mediation.³⁴⁴ Nine expressed concern that at times disputants were coerced by the other side or the mediator into settling for an inappropriate amount.³⁴⁵

For example:

I think there's cases where parties probably accept positions, certainly less than what they should in some circumstances. I mean a good example of that is that, for example, you're \$50 grand apart and the mediator walks in and says 'just meet in the middle' and the client thinks that's a good idea sometimes, when really they don't have to, really they shouldn't. I think those sorts of situations happen where the mediation loses its focus of who is actually in a strong position and who may not be in a strong position, based on pure figures ... If the client says yes to it that's no trouble, but I think that there's a bit too much emphasis on it sometimes that sort of sends a bad message to the client as well.³⁴⁶

Insurers can treat mediation as a cheap way to resolve a claim, meaning that plaintiffs can end up worse off than if they proceeded through the trial process.³⁴⁷

³⁴⁴ Lawyers 2, 3, 4, 5, 10, 16, 19, 21, 30, 34, 35, 36 and 40.

³⁴⁵ Lawyers 2, 3, 4, 5, 19, 21, 30, 35 and 36.

³⁴⁶ Lawyer 19.

³⁴⁷ Lawyer 4.

Another four practitioners believed that the compulsory nature of mediation compelled disputants with strong legal cases to consider compromising their position.³⁴⁸ For example:

A major disadvantage is that on the rare occasion that you don't think that there is any chance at all that you will be found liable as a defendant and you go to the mediation and the expectation in the mediation is that the parties will have starting points and will move to somewhere in between those points and will settle. And sometimes that's unlikely, not very often but it happens and I don't know that it's a - well the disadvantage is the expectation of behalf of both the other party and the mediator that as a defendant's representative there's going to be a lot of money handed out. Sometimes that doesn't happen and people don't understand that.³⁴⁹

Often people's rights are not fully met. There's obviously always an element of compromise in mediation so a client hasn't had their rights determined in a court ... I think at times there are settlements reached at mediation which I don't think are satisfactory because of under preparation or the mediation is too early ... But I think all of that stems from under-preparation, the client not really knowing what their rights are, not really knowing what the appropriate entitlement is so far as remedy goes. So I think it flows from there. Those rights aren't properly put at the mediation and you get a settlement which is not appropriate ... Mediation in some cases has become a bit of a lazy way out of litigation, particularly of difficult mediation, get a few bucks, get the legal costs paid and put the file away.³⁵⁰

The disadvantages are that it virtually compels a party to consider compromising a claim no matter how strong it is ... the likely outcome of which is that your client either gives up something that they really shouldn't, or there's no settlement, which means that nothing has been achieved.³⁵¹

³⁴⁸ Lawyers 10, 16, 34 and 40. Lawyer 35 also expressed this view but is included in above n351.

³⁴⁹ Lawyer 40.

³⁵⁰ Lawyer 34.

³⁵¹ Lawyer 16.

The concerns about inappropriate settlements expressed by these practitioners are consistent with an expectation that the court-connected mediation process ought to deliver justice to the parties in the sense of an outcome that reflects the value of the legal claim. From the view of these practitioners, settlement itself is not enough and the nature of the court-connected mediation process does not safeguard against unjust settlement agreements. One lawyer did comment that there was no such disadvantage because inappropriate settlement offers would result in the status quo of continuing through the trial process.³⁵² In other words, such offers would be rejected. However, other practitioners perceived that many parties succumb to pressure to settle.

Some of the stories told in response to the interview question about the 'worst' experience at mediation reinforced the concerns about injustice sometimes occurring at mediation. Of the thirty nine practitioners who answered the question, five (13%) reported that their 'worst' experience at mediation was one in which the opposing legal practitioner had not advised their client correctly or had failed to prepare properly for the mediation.³⁵³

One 'worst' story reported an occasion where a legal practitioner had been negligent but nonetheless attended mediation in a position of absolute weakness.³⁵⁴ A senior practitioner had let a matter run out of time before filing proceedings against the main defendant, although proceedings were filed against two other defendants. The practitioner sent a more junior practitioner to the mediation.

You cannot go into a mediation in a position of weakness like that. And that solicitor was dealing with it, they hadn't said to him 'look, you really need to have someone else deal with

³⁵² Lawyer 35.

³⁵³ Lawyers 14, 20, 21, 23 and 31.

³⁵⁴ Lawyer 21.

this for you'. And there were three solicitors on the other side ... just pounding a junior solicitor who'd been sent down on behalf of the senior solicitor to pick up the pieces. And it was just an embarrassment. I talked to the mediator about it later who said it put him in a really difficult position and he really had to consider what to do. He had to consider talking to the party about them really needing to get some independent advice.³⁵⁵

Justice is clearly a concern for many legal practitioners and when they perceive that mediation has failed to deliver a result in accordance with legal principles, some consider the mediation experience to rate amongst their worst.

5.2.3 Balancing 'justice' with adversarial advocacy

The dilemma of finding an appropriate balance between fearless adversarial advocacy and upholding the law is faced by all legal practitioners participating in court-connected mediation. This dilemma arises because there is no third party decision-maker whose role is to determine a 'just' outcome according to law.

Instead, the parties determine the outcome and there is more potential for imbalance between the advocacy skills of legal practitioners to affect the outcome.³⁵⁶ Inevitably, individual lawyers tend to reach varying conclusions about the appropriate balance between their competing obligations of advocate and officer of the court. On the one hand, some lawyers choose to adopt a traditional advocacy role, where they relay information to the opposing side in order to highlight the strengths of their own case and the weaknesses and risks of the opponent.³⁵⁷ On the other hand, others see little point in rehearsing their previously stated rights based arguments in mediation.³⁵⁸

Some lawyers report that increased teamwork and cooperation rather than an

³⁵⁵ Lawyer 21.

³⁵⁶ See Chapter 4 [4.3.4].

³⁵⁷ Relis (2009), above n141, 153.

³⁵⁸ Macfarlane (2002), above n5, 285.

adversary culture has started to emerge in some programmes, however others persist with adversarial or obstructive tactics.³⁵⁹ Some lawyers believe that they have a duty to accede to any lawful client request, including adopting competitive, positional tactics.³⁶⁰

In this part, the responses from Tasmanian lawyers in relation to the boundaries they draw between advancing their client's best case and achieving outcomes that are legally 'fair' are examined. The following story emphasises the tension between wanting to be reasonable and pursue 'justice' and the obligation to promote the interests of a client. This tension is particularly apparent where the interests of the other disputant are perceived to be promoted inadequately by the opposing legal practitioner:

...one where I was acting on behalf of the defendant and I felt that the plaintiff's solicitor had not done any preparation, wasn't a solicitor who you would normally see doing personal injury litigation acting on behalf of a young fellow who'd suffered significant injuries in an accident. And I just felt ... sorry for that fellow because I didn't feel that he was being given good advice and good service. And it was difficult because I was acting on behalf of the defendant so I obviously had my own client's interests to serve. It wasn't a pleasant experience.³⁶¹

This same dilemma was referred to by another lawyer, whose client agreed to make a reasonable and 'fair' offer rather than taking advantage of the perceived failings of the opposing lawyer and thereby disadvantaging the plaintiff.³⁶²

One factor that should be acknowledged is that it is difficult for lawyers to be sure that their own assessment of the legal case is accurate. Although it may seem that a

³⁵⁹ Macfarlane and Keet (2005), above n69, 699-701.

³⁶⁰ Gerschman (2003), above n84, 10.

³⁶¹ Lawyer 20.

³⁶² Lawyer 31.

practitioner on the other side has given substandard advice, it may be that there is information available to that practitioner that reduces expectations about the strengths or weaknesses of the case. Failing to disclose information is a protective, competitive tactic, particularly where there is a willingness to settle on the basis of that information. Despite this possible explanation for the acceptance of offers that appear unfair to the other side, the reports by the practitioners nonetheless demonstrate a clear concern about the substantive justice achieved in mediation.

Although there was a widespread belief amongst the lawyers that mediation ought to promote consideration of and adherence with legal principles, some of the interviewees did not experience discomfort about outcomes that departed from them. Some legal practitioners are prepared to persuade an opponent that their legal case is weaker than it actually is. Six legal practitioners reported that their 'best' experience at mediation was when their persuasive skills had achieved a particularly favourable outcome.³⁶³ For example:

If you're organised and the other side isn't and you're in a position to put your case very clearly, you're going to get a much better result than someone who comes along and treats it as an informal process and is not organised.³⁶⁴

...had a client who had a tough case basically ... So I said to him ... look, if we get you \$50,000 here, it will be a good outcome ... we got to mediation and we almost got triple that so it was really good ... and I thought well that's really good because I think we've, we've actually accentuated all the good points ... I don't think they realised how strong a case they had against them. So it was a really good outcome there.³⁶⁵

³⁶³ Lawyers 7, 10, 20, 22, 33 and 36.

³⁶⁴ Lawyer 7.

³⁶⁵ Lawyer 10.

These reports were not of occasions where 'justice' prevailed in the sense of the outcomes being in accordance with the likely trial outcome. They were, however, examples where the clients' legal case had been promoted with some success. The persuasive skills of the lawyers had attained a desirable result.

Of the thirty nine respondents to questions about 'best' and 'worst' experiences at mediation, eleven (28%) reported instances where they had attained an adversarial advantage through the mediation process as 'best' experiences at mediation. Five of them reported adversarial victory or the achievement of a result that would probably not have been achieved had the matter proceeded to trial.³⁶⁶ In these cases the delivery of justice was outweighed by the duty of fearless advocacy. For example:

...there were three defendants ... there wasn't all that much involved in it but we were expecting to have to pay something out but we, between us we managed to hit [lawyer] and the client between the eyes and we didn't pay anything.³⁶⁷

Counsel that we had obtained advice from in relation to liability had suggested some years earlier that if he could settle for half of what he eventually settled for, actually a third of what he eventually settled for, he'd have been doing particularly well, because he didn't see that he was likely to discharge his various burdens. So the mediation process really assisted greatly in achieving an outcome which I am very dubious he would have received at trial.³⁶⁸

These 'best' experiences report competitive approaches to dispute resolution. These stories are about 'winning' at the expense of the other client and without regard to the likelihood of achieving such a result at trial. At trial the arguments would be subject to more scrutiny than at mediation. Furthermore, in contrast to trial, in mediation

³⁶⁶ Lawyers 5, 17, 26, 41 and 42.

³⁶⁷ Lawyer 5.

³⁶⁸ Lawyer 17.

there is no third party decision maker to temper the zealous promotion of one disputant's interests over another's. This may lead to injustice where the other disputant has less forceful legal representation. One practitioner reported that he had come away from a mediation commenting to a defendant client that 'we shouldn't have settled that, not for that anyway.'³⁶⁹ This story was one of adversarial victory within mediation by persuading a plaintiff to settle for less than the legal practitioner thought the case was worth. It was clear that the practitioner felt some discomfort about the less than 'just' outcome (based on his own assessment of the value of the claim). However, he considered that his duty to promote his client's financial interests should take priority.

5.2.4 Conclusions about the goal of achieving justice through the application of the law

The interview responses demonstrate that legal notions of justice play an important part in the court-connected mediation process. Overall, most legal practitioners appear to prioritise legal considerations in their mediation practice and believe that the primary purpose of mediation is to apply the law to the dispute. Some lawyers' interpretation of their duty of fearless advocacy presents an obstacle to the achievement of justice in court-connected mediation, because there is an opportunity to exploit imbalanced representation.

When the primary goal of a mediation process is to deliver justice by applying legal principles to the dispute, this goal can be achieved by the legal experts playing the main participatory role, by the prioritisation of legal principles in discussions,

³⁶⁹ Lawyer 14.

evaluation of the merits of the claims by lawyers and mediators, lawyer rather than disputant control of the content, persuasion and rights-based bargaining. These are predominant features of the court-connected mediation process at the Supreme Court of Tasmania.³⁷⁰ Lawyer perspectives reinforce the pursuit of this goal.

5.3 The goal of settlement

The goal of settlement is a mediation goal that is common to all of the problem-solving models of mediation, which aim to resolve a dispute that has arisen between the parties.³⁷¹ Settlement may be attractive from the perspective of all stakeholders in court-connected mediation programmes including the disputants, lawyers, mediator and court administration.³⁷² Welsh and Relis both found that settlement was an important goal for parties.³⁷³ Thirty-one percent of the lawyers involved in Gordon's research believed that the primary purpose of mediation was to reach a settlement.³⁷⁴ Settlement is consistently identified as a primary goal by lawyers in many different court-connected programmes.³⁷⁵ It was anticipated that the goal of settlement would be shared by most Tasmanian lawyers.

The goal of settlement concerns the pursuit of agreement and efficiency. Agreement does not necessarily prioritise efficiency, as some cooperative approaches to

³⁷⁰ See Chapter 4.

³⁷¹ These include the facilitative, evaluative and settlement models but not the transformative model. See Chapter 2 [3.3].

³⁷² Settlement may not be attractive to disputants who want a public decision-making process. See Clark D. Cunningham, 'The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse' (1992) 77 *Cornell Law Review* 1298. Settlement may also be unattractive to lawyers who want the money, experience or prestige that comes from running a trial.

³⁷³ Welsh (2004), above n139; Relis (2009), above n141.

³⁷⁴ Gordon (1999), above n30, 230.

³⁷⁵ See for example: McAdoo (2002), above n55, 428-249; McAdoo and Welsh (2004-2005), above n101, 420; Genn et al (2007), above n41, 160; Schildt, Alfini and Johnson (1994), above n28, 24; Saville-Smith and Fraser (2004), above n4, 27.

negotiation may require considerable investment of time and preparation in order to pursue agreement, which are not necessarily more efficient than alternative processes. On the other hand, sometimes efficiency may be pursued at the expense of substantive considerations such as satisfaction or legal principles. The goal of settlement will therefore be considered in two parts, the first relating to the pursuit of agreement and the second relating to the pursuit of efficiency.

5.3.1 Pursuit of agreement

Consensual outcomes may be preferable to outcomes that are imposed. Nineteen of the forty two lawyers interviewed (45%) identified that court-connected mediation promotes positive benefits of agreed over imposed outcomes.³⁷⁶ The positive benefits of agreed over imposed outcomes include avoiding trial and increased satisfaction.³⁷⁷

Avoidance of trial

Fourteen legal practitioners (33%) pointed to the avoidance of trial as a benefit of court-connected mediation.³⁷⁸ Six of them stressed the negative experience of trial.³⁷⁹

For example:

A clear advantage for most plaintiffs is that it keeps them out of a courtroom. There are a few plaintiffs who desperately want their day in court because that's what's important to them, but that's pretty rare really. Even the ones who insist that they want their day in court don't really like it much when they get there.³⁸⁰

There is a feeling of wellbeing in a client in that they can see this practical process that may prevent them from having to walk through the doors of the court. It's something that they can

³⁷⁶ Lawyers 6, 9, 10, 11, 12, 14, 15, 17, 19, 20, 21, 23, 25, 32, 35, 38, 40, 41 and 42.

³⁷⁷ See [5.1] above for comments relating to satisfaction.

³⁷⁸ Lawyers 9, 10, 11, 12, 14, 15, 17, 20, 21, 23, 32, 38, 40 and 41.

³⁷⁹ Lawyers 12, 14, 17, 23, 38 and 41.

³⁸⁰ Lawyer 14.

cling onto, floating down the river, and it's a lifeline that they can cling onto before they have to climb over the edge and see what happens in the maelstrom. So that's an advantage of dealing with them. So you're not dealing with someone who's thinking 'oh god I've embarked upon this process because I've issued a writ and now I've got to end up in the court.' So there's that option there. So that's an advantage.³⁸¹

These comments recognised the benefits of agreement over the undesirable and unpleasant experience of trial. They assume that trial is an unpleasant, unpredictable experience that should be avoided. The unpredictability of trial relates to the risks of an unfavourable outcome. These comments also assume that trial is the likely alternative to settlement at mediation.

Seven interviewees pointed to the opportunity to avoid the risks of trial and thereby benefit from a certain outcome.³⁸² For example:

People can trade off uncertainty for less money if they don't want to keep on going with the process.³⁸³

The risks of trial provide an incentive to compromise.

Opportunity to cooperate

Another benefit that relates to the pursuit of agreement is the opportunity that mediation provides to cooperate with the other side. Many lawyers recognise and take advantage of the opportunity to cooperate in mediation.³⁸⁴ Mediation provides a structured and productive opportunity to engage in settlement negotiations. An increased opportunity to engage in settlement negotiations was cited as an advantage

³⁸¹ Lawyer 32.

³⁸² Lawyers 10, 11, 15, 20, 24, 32 and 40.

³⁸³ Lawyer 11.

³⁸⁴ Wissler (2002), above n30, 644; MacFarlane (2002), above n5. MacFarlane's 'true believers' and 'pragmatists' recognise this opportunity.

of court-connected mediation by thirteen of the forty two interviewees (31%). For example:

It institutionalises an expectation that there will be negotiation.³⁸⁵

It provides a formal setting to enable people to reach resolution of their cases and without that formal setting, there is a risk that too many cases just go forward without thought being given to settlement.³⁸⁶

This suggests that the formal, compulsory nature of court-connected mediation provides benefits over the more traditional process of informal lawyer negotiation.

The following comment emphasises that advantage.

I suppose the advantage it has over simple one to one negotiations with another practitioner is that they're there and there's a third party present and so there's almost a sense of moral obligation to participate in the discussion, whereas if you simply ring them up then they can just blow you off and say 'oh no, I'm not interested.' It provides a more or less formal forum in which the question of settlement can be ventilated.³⁸⁷

The advantage of cooperative pursuit of agreement is affected by the willingness of other legal practitioners to engage in the process cooperatively. Nineteen of the thirty-nine³⁸⁸ legal practitioners who responded to the question about 'worst' experiences at mediation (49%) related an experience worsened by the non-cooperative approach of the opposing practitioner. The most common complaint was

³⁸⁵ Lawyer 38.

³⁸⁶ Lawyer 36.

³⁸⁷ Lawyer 35.

³⁸⁸ Not all legal practitioners were asked all of the questions in the interview schedule. There were a number of reasons for these omissions. See further Chapter 3 [4.1].

that the opposing legal practitioner did not cooperate or engage with the mediation process.³⁸⁹ Some examples of these stories are:

I had one with a very senior practitioner and to put it blunt he's a very arrogant man and he's one of those sorts of guys who is totally for letter of the law over substance. Total personality clash right. ... before he even heard a word of what we said or what the mediator said, he's told his client 'this is the end figure, don't budge' ... It just degenerated into him trying to show greater legal knowledge, rather than in my 'look' trying to resolve the matter. ... I don't think he ever gave the mediation a chance. And when you've got someone like that it's just a horrible experience because all that ends up happening is, the client gets pissed off and the practitioners end up disliking each other. So, very counter-productive in my book.³⁹⁰

Well I had one recently which I managed to settle for \$525,000 but the process itself was just very adversarial. ... Right off the bat it was just nothing like a mediation process should be ... Probably my worst experiences are when you move away from the spirit of mediation and you end up having to become more litigious than you would like. ... In the end because we'd pissed each other off so much we didn't end up agreeing his costs, we had a taxation on the costs and everything else after that was just deliberately problematic because it had just been such an unfulfilling process to get there.³⁹¹

My worst experience has come with one or two practitioners who I just know that it is going to be a trial, it is not a mediation. It is going to be the person on the other side saying 'the plaintiff's case is x, y and z. I will lead this evidence. We're not going to lose, our damages are etc.' ... and you've got to tackle those things and say 'well alright, I agree with you, you have strong points on this but these are some of the things that we say and we would say this etc etc and we could have a discussion about that.' ... and they'll just say 'no, no we don't concede that.' ... You don't see what the purpose is.³⁹²

³⁸⁹ Ten practitioners (26% of respondents to this question) told stories of their worst experience that resulted from such an approach. Lawyers 10, 13, 22, 25, 26, 28, 29, 32, 36 and 41.

³⁹⁰ Lawyer 10.

³⁹¹ Lawyer 28.

³⁹² Lawyer 41.

These three extracts imply that purely legalistic or adversarial approaches to mediation are inappropriate. Each of the practitioners demonstrated a preference for an exploration of settlement in terms of pragmatic or economic considerations as well as application of the 'letter of the law.' The final comment expresses a desire for conversation about the legal case in a non-adversarial way, with acknowledgement or acceptance of potential weaknesses. A competitive trial-like approach was antithetical to the purpose of mediation, to pursue settlement.

For five practitioners, their worst experience was where they ended up in a skirmish or on the receiving end of a personal attack by the opposing practitioner.³⁹³ Such approaches do not promote agreement, efficiency or satisfaction. Not all lawyers embrace the opportunity to cooperatively pursue agreement in mediation.

It's an excellent process if both counsel come with the idea of realistically attempting to settle but it's not always the case.³⁹⁴

Overwhelmingly, the legal practitioners who mentioned the opportunity to cooperate were of the opinion that it was a positive consequence of mediation. However, this opportunity was tempered by the attitudes of other legal practitioners.

Serious attention to settlement

The following comment reflects the view of many practitioners that a more widespread orientation to serious settlement negotiations within court-connected mediation is desirable.

It gives the parties an opportunity to save substantial time and cost at an early stage if both parties embrace it. And that's one of the difficulties that I see in that I still don't think that we

³⁹³ Lawyers 5, 17, 19, 30 and 31.

³⁹⁴ Lawyer 28.

have had a cultural change. I think that there are far too many practitioners who see it as a – that they have to pass through and might achieve a settlement rather than necessarily an essential part of the way in which litigation is practised.³⁹⁵

The interview responses demonstrate the problem that arises when diverse expectations of and approaches to court-connected mediation are maintained within a single legal community. Although the benefits of an opportunity to pursue cooperative agreement were widely recognised, some practitioners were perceived to adopt a less than cooperative approach. Although parties may be ordered to attend mediation, they cannot be forced to cooperate.

5.3.2 Pursuit of efficiency

It is commonly claimed that court-connected mediation improves the efficiency of litigation. Saville-Smith and Fraser's research in New Zealand concluded that the three main advantages that New Zealand lawyers' perceive from dispute resolution processes are reduced cost, quicker resolution and reduced uncertainty about the outcome in the court system.³⁹⁶ Spiegel found that the overwhelming majority of Queensland lawyers considered reduced cost and delay to be the primary purposes of mediation.³⁹⁷ Similarly, Field's survey of Queensland family law practitioners found that they recognised advantages of cost and time savings as well as the non-adversarial nature of mediation.³⁹⁸ McAdoo reports that 67.9% of the Minnesota lawyers she contacted chose mediation to save expenses.³⁹⁹ Cost containment was also the most frequently cited reason for using mediation in the London Central

³⁹⁵ Lawyer 41.

³⁹⁶ Saville-Smith & Fraser (2004), above n4, 27.

³⁹⁷ Spiegel (1998), above n3, [26].

³⁹⁸ Field (1996), above n3. The other main advantage identified was flexibility.

³⁹⁹ McAdoo (2002), above n55, 428-429. McAdoo's data included 23 in depth interviews and 748 questionnaires.

County Court.⁴⁰⁰ It was expected that these efficiency benefits would also be perceived by Tasmanian lawyers.

Efficiency-related benefits of court-connected mediation were identified, particularly in response to the questions 'What are the advantages of court-connected mediation?'⁴⁰¹ and 'What are we gaining by having so many cases go to mediation?'⁴⁰² Overall, twenty-nine of the forty two interviewees (69%) mentioned efficiency related benefits of court-connected mediation when answering these questions. The efficiency benefits that were identified related to perceptions of an increased likelihood of settlement, earlier attention to settlement and affordable resolution of litigation.

Increased likelihood of settlement

The first efficiency claim was that court-connected mediation has increased the likelihood of settlement. Fifteen (36%) interviewees claimed that court-connected mediation has achieved gains in institutional efficiency by reducing the number of matters that go to trial.⁴⁰³ For example:

We're obviously improving the ability to have matters listed quickly at trial because there are fewer cases going to trial. I suppose those cases which ought to settle and cases where there's no dispute, defences that can properly be raised, are being weeded out in the same way that video taping interviews has reduced criminal trial considerably. Those cases that ought to settle are more likely to settle and that's a gain.⁴⁰⁴

⁴⁰⁰ Genn et al (2007), above n41, 160.

⁴⁰¹ All forty-two interviewees responded to this question.

⁴⁰² A total of thirty-five interviewees responded to this question. The other seven legal practitioners were not asked this question, which was included in the interviews following preliminary reflection on the data.

⁴⁰³ Lawyers 10, 13, 14, 16, 22, 23, 25, 26, 32, 33, 34, 35, 37, 39 and 40.

⁴⁰⁴ Lawyer 16.

Freeing up the court system and makes it far easier for people to access the courts. I mean ten years ago, I'm just picking a number, but ten years ago it was far more difficult, much more difficult to get your case into court. In terms of 'well, I'm sorry, we know that you've got a certificate of readiness signed but we're full up. We've got to let a few out before we can let a few more supporters in.' But that's not the case now. The reality is that for most of this year the judges, with all respect to them, have been sitting around twiddling their thumbs so far as civil litigation is concerned. And there are all sorts of reasons for that but one of those is because mediations tend to knock 'em over.⁴⁰⁵

Analysis of the Supreme Court's statistical data in Chapter 4⁴⁰⁶ does not demonstrate a reduction in either the proportion of litigated matters that end at trial or a sustained or significant improvement in timeliness indicators that can be attributed with certainty to the court-connected mediation programme. Notwithstanding this analysis, there is a dominant perception amongst the Tasmanian legal profession that the number of matters which go to trial has been reduced by the availability of court-connected mediation.⁴⁰⁷ This is not, however, a universal belief amongst the profession as is demonstrated by the following comment:

I don't know if you're getting more resolutions than before. I suspect it's the same 2% or 5% that go to trial.⁴⁰⁸

This comment more accurately reflects the statistical indicators described in Chapter 4. Although there has been a reduction in the number of civil matters that go to trial, this coincides with reduced numbers of matters filed, increasingly active case management and changes in the types of matters litigated in the Court. Court-

⁴⁰⁵ Lawyer 32.

⁴⁰⁶ Chapter 4 [5].

⁴⁰⁷ A similar finding was concluded in Clarke, Ellen and McCormick (1995), above n181, 53.

⁴⁰⁸ Lawyer 29.

connected mediation cannot therefore be isolated as the cause of the reduction in waiting lists for trial. It is one factor of many that have contributed to that reduction.

However, there are indications that mediation does influence settlement timing, particularly prior to the listing of a matter for trial. The statistics indicate that there has been a reduction in the number of matters that are prepared for trial.⁴⁰⁹ This reduction is achieved by settlement occurring earlier in the litigation process. This undoubtedly does deliver cost savings to disputants. It also improves the efficiency of the Court.

Some efficiency related disadvantages of mediation were reported by a small number of interviewees.⁴¹⁰ These disadvantages included decreased revenue from legal fees. Some interviewees mentioned that the improvement of affordability for disputants may impact personally on legal practitioners.⁴¹¹ One practitioner facetiously remarked:

The advantages for the parties are obviously the opportunity to avoid litigation and therefore to avoid significant legal costs, which of course we altruistically participate in even though it takes the bread from our table.⁴¹²

Despite the acknowledgment by a small number of practitioners that mediation may decrease the legal fees earned in individual matters, this loss was not considered to outweigh the other efficiency benefits of mediation.⁴¹³

⁴⁰⁹ Chapter 4 [6.2].

⁴¹⁰ Six interviewees (of 42 =14%) cited efficiency related disadvantages of mediation.

⁴¹¹ Lawyers 20, 25, 35, 36 and 38.

⁴¹² Lawyer 35.

⁴¹³ Lawyers 20, 36 and 38.

Earlier attention to settlement

The second aspect of efficiency was earlier attention to settlement. Savings of time and cost compared to trial was cited as an advantage of court-connected mediation by twenty-six of the forty two interviewees (61%). Trial rather than unassisted negotiation was compared to mediation by lawyers when they identified efficiency advantages.⁴¹⁴ Claims of time and cost savings compared to trial are made consistently in relation to court-connected mediation by governments, courts and the legal profession.⁴¹⁵ Such claims are based on two premises, namely, that trial is a lengthy and expensive process and secondly, that court-connected mediation settles cases that would otherwise go to trial. These premises were apparent in the interview responses. For example:

It's cheaper, it's faster than the trial process...⁴¹⁶

You save people a lot of legal fees, a hell of a lot of legal fees...⁴¹⁷

Trials are expensive. Some of the bills that you send out you think 'my god, that's ridiculous.'⁴¹⁸

The added cost experienced when mediation occurs either at an inappropriate time or in an inappropriate case (being one which 'just will not settle'⁴¹⁹) was mentioned by

⁴¹⁴ Twenty-three interviewees mentioned the word 'trial' when they were relating their perceptions of the advantages of mediation.

⁴¹⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 21st August 2001, 54 (Peter Patmore, Minister for Justice and Industrial Relations); Chief Justice Underwood, 'The Chief Justice's Annual Report for The Supreme Court of Tasmania 2004-2005' (Supreme Court of Tasmania, 2005) 7.

⁴¹⁶ Lawyer 9.

⁴¹⁷ Lawyer 10.

⁴¹⁸ Lawyer 19.

⁴¹⁹ Lawyer 17.

three practitioners.⁴²⁰ Each of them qualified their comment by indicating that it was not a significant problem. For example:

Those matters are in percentage terms very low.⁴²¹

There's almost no down side, apart from the waste of one or two days cost of mediation that might not have been incurred if the case had gone to mediation in the first place, but that's in the scheme of things is small beer because most of the preparation that had been done would have to have been done anyway.⁴²²

This disadvantage was not considered to be a significant problem. The disadvantage posed when dispute resolution fails to reduce cost or increase timeliness was also identified by lawyers who participated in Saville-Smith and Fraser's research.⁴²³

Improved affordability of litigation

The third aspect of efficiency is the improved affordability of litigation. Mediation provides an opportunity for disputants to make commercially sensible decisions to settle rather than proceeding with the expense of the litigation process. Two interviewees stated that the commercially sensible outcomes available at court-connected mediation were its main advantage.⁴²⁴ The following extract demonstrates the commercial focus of one of these legal practitioners, who advised his client that their emotional needs and principles may not realistically be met by the mediation process.

We're doing a better job for our clients. We're giving them an outcome which is more cost effective for them and so therefore we are practising what we preach. Because we say this is not

⁴²⁰ Lawyers 17 and 35 referred to inappropriate referral, lawyer 23 referred to inappropriate timing of referral.

⁴²¹ Lawyer 17.

⁴²² Lawyer 35.

⁴²³ Saville-Smith & Fraser (2004), above n4, 31.

⁴²⁴ Lawyers 28 and 30.

about your emotions or principles, this is litigation and you need to make some commercially sensible decisions in all this. It's commercially sensible to take the matter to mediation rather than trial. And I say this to a lot of people 'the only person who is going to make a lot of money out of going to trial is me, and the other lawyer. We'll be fine because we're going to charge you a lot of money to do it. But if you want to that's fine.' But in reality we're providing a better outcome 95% of the time at least. We should really be saying 'it's not about the principle of this thing, it's about money.' Because what does a lawyer do? Well really it's all about the transfer of money from one party to another. ... We really are part of the business process for a commercial client.⁴²⁵

Improved affordability of litigation by delivering efficiency improvements was considered by sixteen practitioners (of 42 =38%) to be a significant gain derived from court-connected mediation.⁴²⁶ For example:

The parties, plaintiff and defendant, are gaining ... the possibility of removing risk, of getting a certain outcome at a cheaper price.⁴²⁷

Another practitioner cited 'the ability to service many more clients than would otherwise be possible'⁴²⁸ as an efficiency advantage to the legal profession that derives from court-connected mediation.

It is clear from the interview responses that lawyers perceive that mediation has the potential to promote both agreement and efficiency. Most interviewees believed that there were benefits of time and cost savings for most disputants participating in court-connected mediation. This was also perceived to be of benefit to the Court and

⁴²⁵ Lawyer 30.

⁴²⁶ Lawyers 5, 6, 9, 10, 11, 18, 20, 21, 23, 25, 28, 30, 33, 37, 39 and 41.

⁴²⁷ Lawyer 20.

⁴²⁸ Lawyer 25.

lawyers, although there were some concerns that institutional efficiency was sometimes overemphasised at the expense of the individual disputants.

Agreement can be pursued by a cooperative approach within the mediation process, willingness to compromise and sharing of information. Efficiency is promoted by the prioritisation of speed and settlement, lawyer and mediator control of the process and content and incremental bargaining. The interview responses expose a cautious embrace of the potential for mediation to promote settlement. Many lawyers see the potential to promote agreement but complained that not all lawyers embrace that potential. Overall, the interview responses emphasised efficiency related benefits rather than negative consequences.

5.4 Balancing the competing goals of mediation

The interviews demonstrated that lawyers recognise all three of the mediation goals discussed above. It is difficult to assess which of these goals lawyers prioritise over the others. The existence of a variety of views about the primary purpose of mediation within the legal profession is consistent with the range of lawyer views reported by other researchers, including Folberg et al, Macfarlane, Relis and Genn et al.⁴²⁹ The following lawyer saw a number of benefits that derive from mediation:

I think what we are doing is streamlining the judicial process and I think it's really important for people to see that justice is being done. And the one way of doing that is to allow them at a point where they haven't spent huge amounts on litigation to achieve a result that's acceptable to them and to the other party.⁴³⁰

⁴²⁹ Jay Folberg et al, *Resolving Disputes: Theory, Practice, and Law* (1st ed, 2005) 227-230; Macfarlane (2002), above n5; Relis (2009), above n141; Genn et al (2007), above n41.

⁴³⁰ Lawyer 23.

This comment highlights a multitude of expectations. Firstly, that institutional efficiency be improved, second, that the mediation process achieves justice, third that the process be affordable and finally, that the outcomes are acceptable to all disputants.

Overall, the lawyers who were interviewed recognised the potential for mediation to pursue settlements in accordance with legal principles and to promote settlement through both agreed outcomes and efficiency. When their clients' non-legal interests were satisfied, the lawyers valued that experience highly. The lawyer responses demonstrated a mixture of beliefs in the positive potential of mediation, concern about the justice of mediation outcomes and commercial pragmatism, particularly in light of the expensive reality of the litigation process. The subject matter of the 'best' experiences that were related demonstrated the mixture of purposes for which court-connected mediation is used. Almost one third of practitioners related 'best' experiences in each of the categories of maximisation of satisfaction, delivery of justice or obtaining some kind of adversarial advantage.

Legal practitioners perceive the ultimate purpose of mediation in contradictory ways. For example, roughly half of the legal practitioners considered overly competitive or non-cooperative approaches to be inappropriate in mediation and to constitute a 'worst' experience. This contrasts with the 28% (N=11 of 39) who believe that their own adversarial approaches to court-connected mediation had produced 'best' experiences. These contrasting expectations are bound to create situations in court-connected mediation where the participants hold different expectations, which may result in unsatisfying experiences for some participants. Other research has also

concluded that lawyers have a diversity of views about the merits and potential problems of dispute resolution.⁴³¹

6 Conclusion

This chapter has completed the investigation of how mediation is practised in the Supreme Court of Tasmania. Here, a specific focus has been made on reports from lawyers about the way that mediation has impacted upon their general legal practice, the way they prepare for mediation, their perspectives of the appropriate roles of participants and their understandings of the purpose of the court-connected mediation process. These insights have contributed information that addresses each of the hypotheses and related core features. They have also contributed to the explanation for the differences between the potential and reality of court-connected mediation that will be discussed in Chapter 6. Here, findings that address each of the hypotheses and related core features are summarised.

Lack of responsiveness: Priority of legal issues over non-legal considerations

This chapter, together with Chapter 4, has demonstrated that mediation practice in the Supreme Court of Tasmania is very focused on legal issues and encourages efficiency in litigation. Non-legal individual needs tend to be ignored. Many lawyers approach court-connected mediation as they approach other pre-trial and trial processes. Here, the prioritisation of legal issues by lawyers was demonstrated by the way that they prepared for mediation, expectations about the mediator's role and their beliefs about the purpose of court-connected mediation.

⁴³¹ Saville-Smith & Fraser (2004), above n4, 31; Macfarlane (2002), above n5.

Lawyers tended to prepare for mediation as if they were preparing for trial. Most considered the strengths and weaknesses of the legal arguments, the legally relevant issues, considered options for settlement and developed strategies for the mediation process. One half did not consider the 'needs' (non-legal interests) of the parties to be a relevant consideration in preparation for mediation. Most performed their duty to give comprehensive legal advice to clients prior to mediation. Those lawyers who did discuss their clients' non-legal interests prior to mediation tended to narrow their clients' expectations rather than seeking to broaden the scope of the mediation.

Lawyers had mixed reactions to evaluation or legal advice from mediators. However, some expected mediators to assist in the evaluation of the legal case. The strongest reactions against mediator evaluation tended to be when the mediator's opinion contradicted the lawyers' own view. There were no philosophical objections to mediator evaluation on the basis that it was outside the appropriate role of a mediator. Concerns were about the qualifications and experience that would be necessary in order for a mediator to give a reliable opinion.

Lawyers had a mixture of perspectives of the goals of mediation, but tended to emphasise the goals of settlement and application of the law to the dispute more than the goal of satisfaction of individual interests. The interviews reflected an understanding that mediation provides a forum for any of the following purposes: to engage in serious settlement negotiations; to exchange information and conduct a case analysis; to engage the mediator in a reality testing exercise with the client; or to obtain a legal opinion from the other lawyer and/or the mediator. Each of these

purposes demonstrates a focus on settlement with reference to the likely legal outcome.

Limited self-determination: Restricted disputant participation and lawyer control

Lawyers' understandings of the appropriate roles of themselves and their clients demonstrated a clear preference for a spokesperson role by lawyers and restricted disputant participation. This shaped the way that lawyers prepared their clients for mediation, with many reporting that they discouraged their clients from participating directly.

Lawyers generally preferred to act as spokespersons for their clients in mediation by advising, advocating and negotiating. This is consistent with their traditional role in the resolution of litigated disputes through lawyer negotiation or trial.

Lawyers tended to perceive that the appropriate role of their clients in mediation was a largely passive one, although some practitioners encouraged their client's to speak on their own behalf during the mediation process. In those cases, the participation of disputants was stage managed by the lawyers. Lawyers rather than disputants tended to control the content of court-connected mediation.

In preparation of their clients for mediation, some lawyers informed their clients that they could participate directly in the mediation process. However, many warned their clients about the dangers of saying something detrimental to their legal case. Most direct disputant participation was stage managed by lawyers.

Cooperation is stifled: the persistence of adversarial approaches

The lawyer interviews demonstrated that competitive approaches occur frequently within the Court's mediation programme. There was a mixture of views about whether or not this was appropriate. The persistence of adversarial approaches reflects the difficulty in separating court-connected mediation from the formal litigation process.

Some lawyers considered their 'best' experience at mediation to be one in which they had obtained an adversarial advantage, through competitive persuasive tactics. There were mixed perspectives about the appropriate balance between lawyers' duties to the administration of justice and adversarial pursuit of their clients' interests.

There were also mixed results about mediator control of the mediation process. Such control might address any inappropriately competitive tactics. Some lawyers expect mediators to apply some motivation to pursue settlement, although others complained about inappropriate pressure to settle.

The overwhelming majority of practitioners considered the personality of the opposing legal practitioner but only half typically found out who the mediator would be. There were some reports that if particular practitioners were expected to participate in mediation, lawyers forewarned their client that cooperation was unlikely. It appears to be well recognised that cooperative experiences at court-connected mediation varied depending upon the individuals who participated.

The analysis of the interview responses in this chapter completes the presentation of the empirical evidence that is relevant to this thesis. The hypotheses evolved from the theoretical framework established in Chapter 2 and have been tested in Chapter 4 and this chapter. It is clear that each has been demonstrated to be true. Together with Chapters 2 and 4, this chapter has demonstrated that there is a difference between the possibilities of court-connected mediation and the realities of practice in the Supreme Court of Tasmania.

Chapter 6 continues the discussion, synthesises the findings in Chapters 2, 4 and 5 and addresses the final research question: 'Why is there a difference between the possibilities and the practice of court-connected mediation in Tasmania?' Chapter 6 also presents some recommended responses.

Chapter 6

Discussion and Conclusions

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1 Introduction

In this chapter, the key research findings of this thesis are synthesised. Conclusions are drawn in relation to the three research questions posed in Chapter 1:

1. What is possible within court-connected mediation?
2. What is happening within the Supreme Court of Tasmania's mediation programme?

3. Why is there a difference between the possibilities and the practice of court-connected mediation in Tasmania?

The hypotheses are based upon the theoretical framework established in response to the first research question. The examination of the Court's mediation programme has been conducted with reference to the three hypotheses: that mediation at the Court is focused primarily on legal issues, is conducted by lawyers rather than disputants and is sometimes approached in a competitive manner.

Finally, conclusions are drawn in this chapter about the ways in which the Supreme Court of Tasmania, mediation theorists, lawyers and court-connected mediation programme providers generally might respond to the research findings.

2 Key findings

2.1 Question 1: Possibilities in court-connected mediation

In Chapter 2, the mediation field was examined to demonstrate its diversity and to consider whether it would be appropriate to limit court-connected mediation to particular purposes or practice models. It was concluded that such a restriction would be inappropriate, as there is potential for court-connected mediation to pursue a full range of purposes and to have characteristics from most of the practice models that have been described.¹ There are no legislative requirements or policy guidelines restricting the nature of mediation practice in the Court.²

¹ Chapter 2 [3].

² Chapter 4 [3].

To provide a framework for the examination of court-connected mediation, some core features of mediation were demonstrated to be universal within the mediation field.³ Although it is expressly acknowledged that the extent to which the core features of responsiveness, self-determination and cooperation are achieved varies considerably, they are nonetheless always present to some extent in all theoretical and practical mediation models. Some indicators of each of these features were identified. The three indicators that have been tested in this thesis are:

- Mediation provides an opportunity for the interests and preferences of the individual disputants in relation to content to be explored.
- Mediation provides an opportunity for disputants to participate directly in the resolution of their disputes.
- Mediation provides an opportunity for non-competitive, cooperative approaches to dispute resolution to be adopted.

These indicators were expressed as ‘opportunities’ because they are offered as choices for disputants, who may elect to forego one or more of the opportunities.

Where a disputant makes an informed choice to mediate only a narrow scope of issues, to have a lawyer speak on their behalf or to approach the process in a competitive, uncooperative manner, the process nonetheless adheres to the foundational characteristics of mediation. The defining feature of mediation is that there is some opportunity or inquiry about the disputants’ preferences about the way that their dispute will be defined and resolved.

³ Chapter 2 [4].

Accordingly, this thesis has investigated the degree to which each of the opportunities was evidenced in mediation practice in the Supreme Court of Tasmania. Through the lawyer and mediator interviews, the degree to which these participants extended the key opportunities to disputants was considered. The three hypotheses were that in court-connected mediation there is a tendency for non-legal issues to be ignored, for lawyers to participate rather than disputants and for non-cooperative approaches to be adopted. In other words, it was hypothesised that there is a departure from the core features of mediation in the court-connected mediation context in Tasmania.

2.2 Question 2: How mediation is practised in the Supreme Court of Tasmania

Here, some general findings about the mediation programme at the Court are discussed, followed by consideration of findings addressing each of the hypotheses. Implications are considered throughout the discussion and some responses are flagged, but recommended responses are presented in detail in part 3.

2.2.1 General findings

The Court's mediation programme has provided a structured opportunity for settlement discussions to take place earlier in the litigation process than might otherwise have occurred.⁴ It has therefore successfully diverted many matters to mediation in the early stages of the litigation (increasingly, at the close of

⁶ Chapter 4 [3.4].

pleadings).⁵ This has stimulated earlier settlements. Earlier referral means that the opportunity for settlement negotiations is embraced at a time that is more likely to deliver efficiency benefits, including time and cost savings.⁶

The majority of lawyers who were interviewed identified positive changes to their litigation practice as a result of the court-connected mediation programme.⁷ The programme has encouraged more frequent and earlier negotiation between lawyers, either within mediation or outside of it. Many lawyers reported that they define the details of their clients' cases earlier than they did prior to the formalisation of mediation at the Court. For some lawyers, their focus has shifted from trial to settlement.

The finding that lawyers believe that the primary benefit of court-connected mediation is to provide an opportunity to negotiate raises some questions about lawyer practices. Although most litigated matters continue to be resolved without mediation, the question of why some lawyers failed to negotiate earlier and more seriously without the mediation process might need investigation. Unless the mediation process delivers something that cannot be achieved in other processes, lawyers could be encouraged to engage with alternative, less resource intensive processes, including lawyer negotiation and four way meetings between lawyers and clients. There was evidence that some lawyers do initiate negotiations to avoid mediation. This issue is worthy of further investigation.

⁶ Chapter 4 [3.4].

⁶ Chapter 4 [3.4].

⁸ Chapter 4 [2.1].

An over-emphasis on efficiency might result in inadequate attention being paid to the fairness of the mediation process and outcomes. According to the Supreme Court's performance objectives, it has an obligation to ensure that processes conducted under its supervision are conducted fairly as well as efficiently.⁸ The examination of the programme demonstrated that there is scope for unfairness in the mediation process to go unchecked. For example, this research revealed a small number of serious concerns about mediator partiality and breach of the confidentiality of the mediation process.⁹ Furthermore, there was evidence that there was sometimes an imbalance between legal practitioners and further, that some practitioners were willing to take advantage of such imbalance.¹⁰

The Court has not prescribed any guidelines or clear expectations about the nature of the process to be conducted within its mediation programme.¹¹ Nor are there any legislative constraints on the style of mediation that can be practised.¹² The lack of guidelines or consistency in mediator practice, coupled with lack of clarity of the purpose of the court-connected mediation programme, create uncertainty about what mediator interventions would be appropriate, including interventions designed to address potential unfairness.¹³ There was some evidence that mediators tend to leave it to legal practitioners to direct the mediation process.¹⁴ Lawyers had mixed views about the appropriateness of proactive mediator control of the process, however more

⁸ Chapter 4 [2.1].

⁹ Chapter 5 [4.2.2].

¹⁰ Chapter 4 [4.3.4].

¹¹ Chapter 4 [2.3], [3.1].

¹² Chapter 4 [3.1].

¹³ Chapter 4 [5.1].

¹⁴ Chapter 5 [4.2.1].

were in favour than not.¹⁵ One of the reasons cited was to ensure the fairness of the mediation process.

The concerns about unfairness emphasise the need for some quality control measures in relation to the programme. The Court has not implemented any formal quality control procedures.¹⁶ No data has been sought about participants' experiences of the court-connected mediation process. Mediator performance has been monitored on an informal basis, relying on mediator reflections of their own practice.

The Court appears to have placed great trust in the integrity of the mediation process and the participants within it. The mediators all have specialist mediation training and most participants are represented by lawyers. These factors may have contributed to the confidence that the Court appears to have in the quality of its mediation process.

Another general finding was a diversity of views amongst mediators and lawyers about the purpose, scope and practice of court-connected mediation. This diversity emphasises the lack of clarity around the Court's mediation process. For example, the mediators reported contrasting opinions about the appropriateness of mediator evaluation of legal cases.¹⁷ Inconsistent practice was also emphasised by the fact that lawyers reported contrasting experiences about mediator evaluation, with some having never experienced it and others reporting that they had experienced mediator

¹⁵ Chapter 5 [4.2.1].

¹⁶ Chapter 4 [4.1].

¹⁷ Chapter 4 [5.3].

evaluation.¹⁸ There were mixed responses from lawyers about the appropriateness of mediator evaluation of the legal case.¹⁹ However, most objections related to the lack of appropriate qualifications within the current pool of mediators to provide an evaluation, rather than an ideological objection to evaluative mediation. The mixture of views and practices on this point illustrates the lack of clarity regarding the mediators' role in the Court.

2.2.2 Lack of responsiveness to individual preferences regarding content: Non-legal interests tend to be ignored

The first hypothesis relates to mediation's core feature of responsiveness to the individual preferences of disputants in relation to content. The evidence demonstrated that in the programme there is usually a narrow legal focus, but that non-legal issues are occasionally explored. Mediators demonstrated a variety of styles, which illustrates that flexibility has been preserved within the programme to some degree.²⁰ Nonetheless, the lawyer interviews revealed a tendency for most mediations to be conducted in terms of legal issues and to focus on the making of offers rather than the exploration of a broader range of issues or expansion of options.²¹ Mediators' and lawyers' reports are discussed separately.

¹⁸ Chapter 4 [5.3].

¹⁹ Chapter 5 [4.2.3].

²⁰ Chapter 4 [5.1].

²¹ Chapter 4 [5.2].

Mediators

Mediators reported that they managed the mediation process differently between cases.²² The evidence of adaptation of the mediation process to different cases indicates an element of responsiveness to the individual preferences of the participants about process or content.²³ However, mediators pre-determined the suitability of a case for an interest-based approach on the basis of case type.

On the one hand, in motor vehicle, workplace and in commercial debt collection matters, the mediators reported that joint sessions revolved exclusively around the legal issues and monetary outcomes.²⁴ On the other hand, in relationship, estate, non-debt recovery commercial and when a professional who was alleged to have been negligent attended mediation, the approach was different.²⁵ Mediators reported that in this second group of matters they made an assessment to determine whether the mediation ought to be focused on the individual experiences of the dispute or whether the parties considered that the dispute was just about money.²⁶ Where the mediator considered it to be appropriate, there was an opportunity to explore non-legal interests. However, this was a practice applied to a narrow range of cases, constituting a minority of mediated matters.²⁷

²² Chapter 4 [5.1].

²³ Chapter 5 [5.5].

²⁴ Chapter 4 [3.5].

²⁵ Chapter 4 [5.4].

²⁶ Chapter 4 [3.5].

²⁷ Chapter 4 [Chart 3.3].

Plaintiffs were usually invited by mediators to express their extra-legal concerns in private sessions, particularly where it was perceived that these concerns were inhibiting settlement. This practice demonstrated that mediators did provide an opportunity to disputants to express their individual interests. However, where such an opportunity is restricted to private sessions, there are limitations to the degree to which those interests may be reflected in outcomes, because they have not been shared with the other party. The potential benefits of direct participation may therefore be tempered if there is not an opportunity to participate in joint sessions.

Lawyers

While there is scope for a broader view to be taken in court-connected mediation, lawyers tended to take a narrow view of the relevant considerations, mirroring a narrow legalistic approach to dispute resolution.²⁸ There was a tendency for litigation lawyers to disregard or dismiss their clients' non-legal interests as being irrelevant to court-connected mediation.²⁹

It is always appropriate for disputants to obtain legal advice in relation to disputes that they want to resolve at mediation. However, the way that the legal assessment of a claim is used in the decision making process may vary. On the one hand, disputants may use their legal advice as a reference point to consider how the legally available outcome compares with other outcomes in meeting their individual interests and preferences. On the other hand, legal advice may be used to narrow disputants' expectations of the range of outcomes that may be agreed to at mediation. The

²⁸ Chapter 5 [5.4].

²⁹ Chapter 5 [3.1].

second use of legal opinion in mediation departs markedly from the disputant-oriented nature of the mediation process. Accordingly, inquiry was made about how lawyers used their legal opinions in mediation and whether or not they believed that mediated outcomes should accord with legally available outcomes.

As expected, in preparing their clients for mediation, most lawyers considered that it was important for their clients to receive comprehensive legal advice.³⁰ Some lawyers were also attuned to the non-legal elements of disputes and actively considered them in their negotiation planning.³¹ Overall, lawyers perceived that a thorough understanding of the legal case, including an analysis of its strengths and weaknesses and a prediction of the likely outcome at trial, was important in preparation for court-connected mediation.³² Most lawyers prepared for mediation by building a legal case that they could present to the other side in a persuasive way.³³ Some lawyers prepared an opening statement that was much the same as an opening statement at trial.³⁴

However, the evidence supported a conclusion that lawyers tend to use the assessment of the legal case to narrow their clients' expectations about the potential outcomes of the mediation process rather than as a reference point for clients to assess their own preferred outcomes. Lawyers actively narrowed their clients' expectations about what they could reasonably expect to achieve through the court-

³⁰ Chapter 5 [3.2].

³¹ Chapter 5 [3.1].

³² Chapter 5 [3.1].

³³ Chapter 5 [3.1].

³⁴ Chapter 5 [3.1].

connected mediation programme, focusing clients on a range of legal outcomes.³⁵

Lawyers often perceived the mediation process as a way to assist them to manage (that is, limit) their clients' expectations about the available outcomes.³⁶ They valued a mediation process that provided a 'reality check' for their clients about the strengths and weaknesses of their legal claim, whether that be through hearing arguments presented by the other lawyer, the exchange between legal practitioners or the mediator's opinion.³⁷

Although most lawyers discussed their client's non-legal needs and interests with them prior to mediation, many did this in order to advise their clients that the litigation system, including court-connected mediation, could not be expected to meet those needs.³⁸ Many practitioners actively discouraged their clients from expecting to resolve matters of 'principle' and told their clients that they should concentrate instead on a monetary settlement, in light of the costs (financial and non-financial) involved in a trial.³⁹

Lawyers tended to prioritise the efficient resolution of legal issues as the primary aim of the court-connected mediation process.⁴⁰ A common 'best' experience for the lawyer was one where an outcome was achieved at mediation that was a legally 'just' result. Additionally, nearly one-third of lawyers were concerned about the potential for inappropriate settlements to be reached at mediation (being settlement outcomes

³⁵ Chapter 4 [5.4].

³⁶ Chapter 4 [5.4]; Chapter 5 [5.2.2].

³⁷ Chapter 5 [4.2.3], [5.2].

³⁸ Chapter 5 [3.2].

³⁹ Chapter 4 [5.4].

⁴⁰ Chapter 5 [5.2.2], [5.4].

that did not reflect an appropriate amount according to the legal position).⁴¹ Further concern with the fairness of mediation outcomes was expressed by a small number of practitioners who reported ‘worst’ experiences at mediation where the opposing practitioner had either given inadequate legal advice or had failed to prepare properly for the mediation, resulting in outcomes that did not reflect an appropriate legal outcome or making it difficult to successfully negotiate an outcome.⁴²

The prioritisation of legal issues necessarily reduced the focus on non-legal considerations such as commercial interests, non-monetary solutions, relationships between the parties, financial and emotional stress. These kinds of interests take a low priority for lawyers in their preparation for mediation and during most mediations conducted at the Court. In part 2.3 below, the factors contributing to the narrow legal scope of the programme are considered.

2.2.3 Departure from self-determination: Lawyers rather than disputants are the main participants

If the self-determinative potential of mediation is to be achieved, then disputants should have an opportunity to participate directly in the mediation process. It was hypothesised that in court-connected mediation it is lawyers rather than disputants who take the main participatory role. The approach that mediators and lawyers take to the direct participation of disputants was investigated to identify whether

⁴¹ Chapter 5 [5.2.2].

⁴² Chapter 5 [5.2.2].

opportunities for participation are extended to disputants. These approaches are considered separately.

Mediators

Mediators tended not to encourage active direct disputant participation, other than within private sessions.⁴³ The decision about whether or not disputants would participate directly in mediation was left to lawyers and their clients to decide. When lawyers or disputants had decided that a disputant would participate directly, the mediators would support and encourage this.⁴⁴ There was evidence that mediators actively sought agreement from a parties' lawyer before they allowed a party to answer questions that had been put by the other lawyer.⁴⁵

The findings demonstrated that mediators reinforced a lawyer in charge approach to court-connected mediation, similar to the lawyers' traditional role in litigation. In Chapter 2 the dilemma of court officers interfering in lawyers' management of their clients' legal cases was discussed. This is one of the factors that impact upon the extent to which mediators invite disputants to participate actively in the mediation process. See further discussion in [2.3] below.

Lawyers

It was found that lawyers determined the extent of their clients' participation and tended to discourage uncontrolled participation by disputants.⁴⁶ Some lawyers

⁴³ Chapter 4 [3.5], [5.1].

⁴⁴ Chapter 4 [5.1].

⁴⁵ Chapter 5 [4.1.1].

⁴⁶ Chapter 5 [4.1.1].

believed that it was undesirable for disputants to speak during court-connected mediation. Most lawyers were cautious about direct disputant participation for fear that the client would compromise the strengths of legal arguments to be made in their favour.⁴⁷ Those lawyers who did facilitate their clients' participation tended to stage manage the clients' contributions to the mediation process.⁴⁸

The opportunity for direct disputant participation was recognised by lawyers, even though they tended to restrict that opportunity. Many lawyers identified that the presence of clients in mediation was a factor that distinguishes it from lawyer negotiation.⁴⁹ A small minority of lawyers recognised the potential benefits of the opportunity to participate directly in the mediation process.⁵⁰ The tension between providing the opportunity to participate directly in mediation and managing the clients' legal case is discussed further in [2.3] below.

2.2.4 Stifled cooperative potential: Competitive approaches are adopted within the programme

The cooperative potential of mediation may be modified when it occurs within a primarily adversarial legal system. On this basis it was hypothesised that competitive, non-cooperative approaches would occur in court-connected mediation practice. It was found that such approaches occurred within the programme and were complained about by several lawyers.

⁴⁷ Chapter 5 [4.1.1].

⁴⁸ Chapter 5 [4.1.1].

⁴⁹ Chapter 5 [2].

⁵⁰ Chapter 5 [4.1.1].

Negotiation styles adopted within the programme were often competitive in nature. Practitioners described distributive and positional bargaining styles as ‘typical’ in the court-connected mediation programme.⁵¹ Many practitioners were willing to aggressively pursue their clients’ interests to try to achieve outcomes that were particularly favourable for the client.⁵²

There was evidence that some members of the legal profession are willing to take advantage of imbalances between themselves and other lawyers in mediation.⁵³ This demonstrates a competitive approach that promotes the adversarial interests of a client over other considerations such as fairness. Such behaviour may be responded to by a judge in court but probably occurs without sanction in unassisted lawyer negotiations.

Three lawyers reported that court-connected mediation has forced a break-down of adversarial approaches in litigation.⁵⁴ However, both the small number of lawyers who mentioned this and the evidence of adversarial approaches within the programme, demonstrate that there is a mixture of views on this issue.⁵⁵ Factors which contribute to the persistence of competitive approaches to court-connected mediation are discussed below.

⁵¹ Chapter 4 [5.2].

⁵² Chapter 5 [5.2.3].

⁵³ Chapter 4 [4.3.4].

⁵⁴ Chapter 5 [2].

⁵⁵ Chapter 5 [2], [5.2.3].

2.2 Question 3: Explanation for the differences between the possibilities and practice of court-connected mediation in Tasmania

There are a number of factors that have contributed to the departure from the core features of responsiveness, self-determination and cooperation in the Court's mediation programme. This research has confirmed that in general, mediation at the Court has a narrow legal focus, lawyers dominate and competitive approaches are often adopted. The four factors that contribute to the minimisation of mediation's core features at the Court are: the connection with the formal litigation system (which includes the dilemma defined in Chapter 1 and 2), programme features, mediator practices and lawyers' practices and perspectives.

2.3.1 Connection with the formal litigation system

The dilemma of the Court's duty to apply the law to disputes impacts on the responsive capacity of court-connected mediation and encourages a preoccupation with legal issues. However, there is a distinction between ensuring that there is a reference to the law during the decision-making process and requiring outcomes to comply with those that would be available at trial. It may be that an analysis of the legal case during the mediation process is sufficient to discharge the Courts' duty to apply the law to disputes. Lawyers and mediators with legal expertise are equipped to provide such an analysis.

The Court appears to have relied upon its mediators and lawyers to discharge its duty towards application of the law to disputes. The participation of legally trained people in mediation means that it is inevitable that legal issues are considered during the process. Most participants in the programme are represented by a lawyer and the mediators all have a background in law.⁵⁶ Lawyers play a part in drafting the documents that finalise the litigation and should provide legal advice about their appropriateness in accordance with their professional responsibilities to their client. Most lawyers prepare the legal case in preparation for mediation.⁵⁷

The apparent transfer of the Court's duty to the administration of justice to mediators and lawyers is problematic. Both of these groups of participants are officers of the Court. However, there is a lack of explicit expectation that they are responsible to provide an assessment of the legal case during the process on the Court's behalf. Lawyers do have such an obligation to their clients. However, if the Court expects lawyers to discharge its own duty to apply the law to disputes, then this should be made clear. Furthermore, given the mixed practices in relation to mediator evaluation, it is very important that the Court clarify its expectations about the role of mediators. The mediator's role may include facilitating a discussion of the legal issues between lawyers, providing advice about the law to the parties, assisting the reality testing process or providing an independent legal opinion regarding the dispute. Presently, there is not clarity around the boundaries of the mediators' role within the Court's programme.

⁵⁶ Chapter 4 [4.2], [4.3].

⁵⁷ Chapter 5 [3.1].

The context of litigation impacts upon the practice of mediation in the Court by encouraging the almost exclusive focus on legal issues and discouraging direct disputant participation. In the litigation process, non-legal interests are regarded as irrelevant and are excluded from consideration. The court context does mean that the legal issues will always take some priority in discussions as disputes will have been largely defined and conducted according to that framework to date. In the litigation process, lawyers and judicial officers are the main actors and communication is very controlled. In other court processes, both pre-trial and at trial, lawyers manage the preparation and presentation of their clients' cases. They act as spokespersons for their clients and carefully manage their clients' contributions in the witness box. Nonetheless, there is scope for court-connected mediation to provide an opportunity to explore a broader range of issues and for disputants to participate directly. What appears to be missing is an acknowledgement or expectation by the Court or the lawyers practising within the programme that these opportunities may be extended.

It is unsurprising that the evidence demonstrated that competitive approaches are adopted frequently within the Court's mediation programme. Participants in any mediation process cannot be required to cooperate. In the litigation context disputants are already engaged in a competitive legal process, may not be participating voluntarily and are usually represented by lawyers, who are trained primarily in adversarial skills. Although most litigation is resolved by consent, lawyers tend to negotiate through positional and distributive bargaining.⁵⁸ Because mediated matters will be referred back to the formal litigation process if they do not

⁵⁸ Chapter 2 [4.3.4]; Chapter 4 [5.2].

resolve, there is a tendency to apply adversarial skills within court-connected mediation. The process appears to be treated as part of, rather than an alternative to, the litigation process.

2.3.2 Programme characteristics

Some programme characteristics contribute to the narrow, legalistic problem definition adopted in the Court's mediation programme. These include the timing of mediation. Mediation usually takes place after pleadings have been exchanged and sometimes quite a bit further into the litigation process.⁵⁹ This means that the problem has been defined in terms of the narrow legal issues. The nature of the disputes that are mediated at the Court also contributes to the focus on legal issues. Most of the matters mediated in the Court's programme are torts actions, primarily for motor vehicle injuries or workers' compensation claims.⁶⁰ In torts matters, the parties who attend mediation usually have no pre-existing relationship. An insurance representative usually attends for the defendant.⁶¹ The only legal remedy that is available in these kinds of matters is monetary compensation. Another relevant factor is that mediations conducted under the programme are located on court premises, which emphasises the connection with the litigation process.⁶²

The broad legislative and policy framework, together with the evidence of mediators' willingness to adapt the process to individual preferences, suggests that it was not the Court's intention for the programme to have a restricted scope. There is no evidence

⁵⁹ Chapter 4 [3.4.2].

⁶⁰ Chapter 4 [Chart 3.3].

⁶¹ Chapter 4 [4.2].

⁶² Chapter 4 [3.2].

that the court-connected mediation process could not deliver an opportunity for individual interests and preferences to be explored, where that is what disputants want. This study does not have the benefit of data from Tasmanian Supreme Court litigants that would identify whether disputants wanted a narrow or broad scope of discussions. Further investigation into disputants' preferences and experiences of mediation in Tasmania would be valuable but is not currently available. However, other research has indicated that disputants value an opportunity to discuss a broader range of issues than narrow legal considerations.⁶³ It is essential that the Court make a decision about the appropriate scope and nature of its mediation programme. This is discussed further in part [3] below.

There are also a number of programme characteristics that contribute to the low rates of direct disputant participation. A consequence of the primary focus on the legal issues is that the non-legal, personal contributions that disputants could make to the

⁶³ See Chapter 2, pp60-62. Relevant research includes: Carol Bartlett, 'Mediation in the Spring Offensive' (1993) *Law Institute Journal* 232; Marie Delaney and Ted Wright, *Plaintiff's Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation* (1997); Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92_text.html>; Judith Resnik, 'Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement' (2002) *Journal of Dispute Resolution* 155; Brad Reich, 'Attorney v Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation' (2002) 2 *Southern Illinois University Law Journal* 183; Nancy Welsh, 'Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value' (2004) 38 *Ohio State Journal on Dispute Resolution* 573; Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (Victorian Department of Justice, 2009); Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge University Press, 2009); Louise Phipps Senft and Cynthia A. Savage 'ADR in the Courts: Progress, Problems, and Possibilities' (2003-2004) 108 *Penn St. L. Rev* 327.

process are not valued highly.⁶⁴ This contributes to the dominance of legal experts during the mediation process.⁶⁵

The characteristics of litigants within the programme impacted upon the degree of direct disputant participation. Many of the litigants who participated in mediation at the Court were individuals (personal injuries plaintiffs, business owners, parties to relationship and estate matters), some of whom were first time litigants.⁶⁶ In contrast, the mediators, lawyers and institutional parties who participated were usually repeat players who were known to one another.⁶⁷ This affected the ease with which individual disputants could participate in mediation. Over-familiarity between repeat players was mentioned as being problematic by two lawyers and one mediator. Furthermore, where insurer defendants attend instead of the individuals involved in the actual disputes, the likelihood of direct dialogue between the parties to the mediation was decreased.

Other programme characteristics that discourage direct disputant participation include the lack of pre-mediation meetings, which has been linked to low rates of disputant participation.⁶⁸ Furthermore, lawyers usually sat on either side of the mediator, with each client beside his or her lawyer.⁶⁹ This positioning tended to reinforce lawyer dominance.

⁶⁴ Chapter 4 [5.4].

⁶⁵ Chapter 5 [5.2].

⁶⁶ Chapter 4 [4.2].

⁶⁷ Chapter 4 [4.3.1].

⁶⁸ Sourdin (2009), above n63.

⁶⁹ Chapter 4 [3.5].

The programme features that impact upon the adoption of competitive approaches to the mediation process include the compulsory nature of court-connected mediation, which means that some participants are not committed to the cooperative opportunity that mediation provides. Furthermore, parties are not invited to commit to the mediation process either at the commencement of mediation or through an Agreement to Mediate.⁷⁰ This, together with the lack of guidelines for mediation in the programme, means that there are no rules to which reference can be made in order to manage participant behaviour.

2.3.3 Mediators' practices

Mediators demonstrated respect for the preferences of lawyers in relation to process and content in mediation. It is perhaps in response to the dilemma of court-connection that the Court's mediators have offered an opportunity for direct disputant participation in private rather than joint sessions. The mediators recognised that most disputants want to contribute directly by voicing particular matters. However, they also recognised the potential for cross-examination to occur in joint sessions. They demonstrated high regard for the local legal profession and lawyers' ability to manage their clients' legal cases appropriately. Mediators were reluctant to interfere in lawyers' management of their clients' cases and protection of their clients' legal interests. This contributed to a 'hands off' approach to decisions about direct disputant participation.

⁷⁰ Chapter 4 [3.5].

The ability for mediators to take a proactive approach to the mediation process, the roles of participants and content is stifled by the absence of guidelines for the Court's mediation programme. Mediators could manage behaviour that crosses boundaries of fairness. If there were clearer guidelines about appropriate behaviour, mediation could be steered in a cooperative direction or discontinued if it was obvious that the participants did not intent to cooperate. There appears to be some desire within the legal profession for more active control of the mediation process by mediators.⁷¹ If overly competitive tactics are allowed to go unsanctioned in mediation, the Court may be open to criticism for failing to ensure that the process is fair. The uncertainty about what constitutes appropriate behaviour within the mediation programme is a matter that ought to be remedied (see [3.1] below).

2.3.4 Lawyers' practices and perspectives

Lawyers' practices and perspectives have a significant impact on the focus on legal issues, low rates of direct disputant participation and competitive approaches to court-connected mediation.

It is clear that court-connected mediation has had some impact on general legal practice. Chapter 5 [2] demonstrated that the Tasmanian lawyers who were interviewed demonstrated general support for mediation and dispute resolution as a means of resolving litigated disputes. Lawyers adopted a mixed approach to their role as dispute resolution gatekeepers, with less than one half reporting that they advised their clients in relation to non-litigious dispute resolution processes. Most legal practitioners always attempted to negotiate a resolution of their clients' disputes

⁷¹ Chapter 4 [5.1].

and advised their clients to participate in court-connected mediation. Eighty-nine percent of experienced interviewees (N=32 of 36) were of the opinion that court-connected mediation has changed the way that they practise because it has provided an opportunity to discuss settlement, has caused earlier negotiation and may have changed the focus of litigation from trial to mediation.

The shift of focus towards settlement has provided an opportunity for some lawyers to obtain mediation-specific skills and to alter the way that they conduct litigation. However, the evidence demonstrated that many lawyers have adopted approaches and practices that mirror traditional adversarial representation. This limited adaptation to court-connected mediation has impacted upon the extent to which the core mediation features of responsiveness, self-determination and cooperation have been achieved within the programme.

The findings indicate that lawyers are determining the scope of discussions and modifying their clients' expectations prior to the mediation process. This means that disputant preferences may not be being accurately communicated within the process. The narrowing of clients' expectations is occurring in the context of no clear intention from the Court that the mediation process will adopt a narrow scope. On the contrary, the practice reported by mediators demonstrates that there is flexibility to adapt the process. Again, the absence of an express purpose of the Court's programme is problematic.

The focus on legal issues in mediation is magnified by the perception of many lawyers that trial experience is a significant factor that equips a lawyer to participate in mediation effectively.⁷² The perceived benefit of trial experience was the ability to conduct an accurate risk assessment of trial, to predict trial outcomes and to assess the credibility of assertions about those matters made by mediators or other lawyers.⁷³ Another perceived benefit of trial experience was the application of advocacy skills in mediation, primarily the skill of persuasively presenting a client's legal case.

Furthermore, the value placed on efficiency by lawyers affects the priorities within the mediation process towards speed and settlement, which often means that lawyers and mediators will dominate and that incremental bargaining will be conducted.⁷⁴

Disputant participation is also affected by lawyers' perspectives of the goals of mediation. Legal practitioners do not tend to view the satisfaction of a broad range of disputants' interests as a primary aim of the Court's mediation process.⁷⁵

Consequently, they perceive less need for direct disputant participation than if this was seen to be a priority. However, an interesting observation was that when they perceived that the parties' non-legal interests were satisfied with the outcome of the mediation process, some lawyers valued those occasions enough to recall them as a 'best' experience at mediation.⁷⁶ Although they may not proactively pursue outcomes

⁷² Chapter 4 [4.3.2]. Trial experience was thought to be part of a suite of skills for effective mediation.

⁷³ Chapter 4 [4.3.3].

⁷⁵ Chapter 5 [5.1].

⁷⁵ Chapter 5 [5.1].

⁷⁶ Chapter 5 [5.1].

that are imaginative or best able to satisfy their clients' interests, lawyers are not blind to the individualised benefits that mediation sometimes delivers. This indicates that lawyers may benefit from the development of skills that will enable them to pursue interest-based solutions proactively for their clients.

The privacy of the mediation process theoretically provides an opportunity for open, cooperative discussions to occur at mediation.⁷⁷ However, the caution expressed by a number of practitioners about the danger of revealing 'too much' in mediation indicates that they discourage open, cooperative exchanges of information during the mediation process.⁷⁸ Lawyers demonstrated a keen awareness of the risks of direct disputant participation. They responded by stifling their clients' free participation in the mediation process. This is another example of lawyer rather than client preferences shaping the mediation process.

2.4 Summary of the key findings

In summary, the Court's response to the dilemma of ensuring fairness of a private and consensual process has been to entrust the mediation process, mediators, lawyers and disputants with responsibility to ensure that the process is fair. There are some indications that this response is inadequate and has not provided a safeguard against unfairness in all cases.

⁷⁷ Chapter 4 [3.1.2].

⁷⁸ Chapter 5 [5.2.1].

Most disputants in the court-connected mediation programme are provided with an assessment of the legal case against which to measure any mediation outcomes that they are considering. This provides them with an opportunity to make decisions based upon an assessment of the risks of proceeding further with the litigation and extra-legal considerations. The Court has no formal guidelines requiring that an assessment of the legal case be undertaken in mediation, however this is clearly what happens in practice.

There was some evidence of use of the flexibility of the legislative and policy framework to adapt the mediation process to individual circumstances. Mediators were the instigators of this adaptation. It appears that many lawyers were of the view that the court-connected mediation process was not intended to be a forum to explore a broad range of their clients' interests. They actively narrowed their clients' expectations about what could be achieved in the process. Therefore, the approach of lawyers to court-connected mediation inhibits the opportunity for the process to be shaped according to disputant interests and preferences.

Some themes emerge from the findings of this research. Beyond efficiency there is a lack of clarity of purpose, scope, approach and roles of participants in the Court's mediation programme. That lack of clarity impacts upon the capacity for mediators to manage the process or to challenge participant behaviours. It also impedes lawyers' ability to monitor mediators' behaviours. Furthermore, the lack of clarity, coupled with 'hands off' responses to lawyer's decisions, reinforces the 'lawyer in charge' approach that is evident.

Another theme that emerges from the findings is the limited, legalistic scope of much court-connected mediation. There appears to be untapped potential for court-connected mediation to have an expanded scope, facilitate more extensive direct disputant participation and encourage more cooperative approaches.

The findings of this research accord with North American empirical research as summarised by Welsh in 2008:

Empirical research has largely supported Professor Riskin's assertion that court-connected non-family civil mediation operates within the frame of litigation. The presence of lawyers, particularly litigators, seems to correlate strongly with the narrow focus. Lawyers dominate the discussions in mediation. ... Ultimately, lawyers indicate that they value mediation because it provides an opportunity for litigation-oriented reality testing that will produce settlement. The mediator is expected to influence the parties through his/her evaluations – of the merits and weaknesses of the parties' claims and defences, credibility of key players and documents at trial, likely costs of pursuing litigation, financial value of the case, and even the parties' sincerity in exploring settlement.⁷⁹

Overall, lawyers' perceptions emphasised the view that court-connected mediation is a tool within the litigation system that resolves cases with reference to the primarily adversarial trial process. This can be contrasted with a view that court-connected mediation is an alternative to trial or lawyer negotiation, which is largely

⁷⁹ Nancy A. Welsh, 'Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically' (2008) 1 *Journal of Dispute Resolution* 45, 48.

autonomous from other litigation processes and therefore not bound by restricted legal views.⁸⁰

The lawyers in the Supreme Court of Tasmania's mediation programme demonstrated a limited understanding of the opportunities that could be embraced through the mediation process. In order for court-connected mediation to achieve more of mediation's key opportunities there is a need for increased awareness within the legal profession about the potential benefits of court-connected mediation.

3 Recommended Responses

The findings support some recommendations about responses by the Supreme Court of Tasmania, mediators and the legal profession. The findings, although based upon lawyer views in a single programme, nonetheless have some implications for court-connected mediation programmes generally. It is concluded that theoretical constructs of mediation do not need to be modified to take account of the special nature of court-connected mediation. The full potential of court-connected mediation may be reached if there is a change of approach from lawyers and court-connected providers. That potential includes the delivery of the key opportunities to explore a range of interests and preferences, for disputants to participate directly and for cooperative approaches to be adopted.

⁸⁰ Dorothy J. Della Noce, Joseph P. Folger and James R. Antes, 'Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection' (2002-2003) 3 *Pepperdine Dispute Resolution Law Journal* 11.

3.1 The Supreme Court of Tasmania and mediators

The Court may choose to respond to the research findings in two alternative ways.

One is to accept the limited opportunities that are offered within the Court's mediation programme, in acknowledgment of the context of litigation in which court-connected mediation occurs. The alternative response is to take action to expand the opportunities that are extended to disputants within the Court's mediation programme. Both responses have implications that should be considered. It is essential that the Court make a clear decision about whether or not its mediation process should deliver extra-legal benefits. If not, the limitation should be made clear.⁸¹

If the first response is preferred, then steps must be taken to ensure that disputants, lawyers and mediators have realistic expectations about the mediation process. This includes expectations that the mediation process will be limited to legal issues and that there will be limited opportunities for direct disputant participation. This research does not have evidence of disputants' expectations about the Supreme Court of Tasmania's programme about these matters. However, research has consistently demonstrated that disputants want an opportunity to participate in their mediation.⁸² It is therefore likely that at least some disputants have expectations that are not met in current court-connected mediation practice. The present study does offer insight

⁸¹ Bobbi McAdoo and Nancy Welsh, 'Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation' (2004-2005) 5 *Nevada Law Journal* 399, above n135, 426.

⁸² See discussion of research findings in Chapter 2 [4.2.2].

into the expectations of lawyers and mediators. Although there were strong trends towards a preference for a narrow legal scope and minimising disputant participation, the diversity of views amongst these participants nonetheless emphasises the need to clarify expectations.

An alternative response is to challenge the status quo and assert that the key opportunities of mediation should be achieved to a greater degree within court-connected mediation and disputants' rather than lawyers' preferences should drive the mediation process. If the Court chooses this response, wide ranging educative measures are essential, because this research has demonstrated that the influence of lawyers on the mediation process has taken it away from the key opportunities of mediation. Lawyers and their clients would benefit from increased awareness of the potential of mediation.

Ultimately, responses to the limited opportunities extended in court-connected mediation practice will depend partly upon the degree to which the Court is willing to impose upon lawyer control of lawyer-client relationships. The attitudes of lawyers suggest that active attempts by mediators or the Court to encourage more extensive disputant participation in court-connected mediation might be resisted. Lawyers take their role of protecting their clients' legal interests very seriously. The potential damage to relationships between the legal profession, mediators and the Court might inhibit the Court's response to the extent of direct disputant participation evident within its mediation programme. It may be that free disputant participation

continues to be limited to private sessions and that it is otherwise managed by lawyers.

There are several recommendations for the Supreme Court of Tasmania and its mediators. The recommended actions relate to clarifying the nature of mediation, meeting obligations to provide a fair process and enhancing choices within the mediation programme. Both general and case by case actions are recommended.

3.1.1 Clarity of purpose, scope and process

The Court needs to do more to manage expectations about the purpose, scope and nature of its mediation process. Issues that require clarification include: the overriding purpose of the programme, the relevance of legal and non-legal issues, the process styles that can be practised, the opportunity for disputants to participate and mediator or lawyer responsibilities (if any) to consider whether outcomes reflect the law. This response is essential, whichever of the fundamental choices outlined above is made.

McAdoo and Welsh have also recommended a clear statement by courts about the primary objectives of court-connected mediation processes:

Courts should clarify that their primary objectives are to provide outcomes that are: perceived as fair; consistent with the rule of law; and likely to be durable. Much less significant are the objectives of providing outcomes that respond to litigants' needs, represent the exercise of parties' self-determination or maintain or enhance relationships.⁸³

⁸³ McAdoo and Welsh (2004-2005), above n81, 425-426.

This quote provides an example of a clear statement of purpose. However, the present research has not demonstrated conclusively that the Supreme Court of Tasmania's mediation programme shares this proposed hierarchy of objectives. Fairness of process has been assumed rather than monitored, the emphasis is more on finality than durability and non-legal considerations are sometimes attended to within the programme.

In the remainder of the recommendations considered below, it is assumed that the Court does not intend to limit the potential of its mediation programme to resolving legal concerns only. The bases for this assumption are: that the Court has not restricted the scope of its programme in any policy statements, there is evidence of mediators' attention to non-legal considerations in some cases and lawyers' appreciated mediation outcomes that satisfied their clients' non-legal concerns. Nonetheless, there are choices to be made by the Court and a statement of its intentions should be made.

Programme guidelines

Clarifying statements could be made through the creation of guidelines by the Chief Justice.⁸⁴ Depending upon the Courts' intentions, such statements might include the following:

- The Supreme Court of Tasmania's mediation programme is primarily intended to pursue the settlement of litigated disputes.

⁸⁴ *Rules of the Supreme Court 2000* (Tas) r519(3).

- Where appropriate, non-legal issues may also be discussed during the court-connected mediation process. These might include financial, business interests, relationship needs or a desire for information sharing about matters that are not strictly legally relevant. Parties and their lawyers should inform the mediator if they would like to discuss a broader range of concerns than the narrow legal issues.
- Mediation is an opportunity for parties to communicate openly about their dispute and to find a solution that is acceptable to all parties. The process is confidential and parties are encouraged to participate freely in the discussions.
- The mediator will guide the mediation process according to the issues that both parties have agreed to discuss.
- The mediation process is flexible and may be adapted to individual circumstances. However, there is a usual format to mediation at the Supreme Court of Tasmania, as follows:
 - The mediator will welcome everybody, introduce themselves and provide an outline of the process.
 - Each party will be invited to make an opening statement about their aim for the mediation and the issues that they would like to discuss. The opening statement may be made by lawyers, parties or lawyers and parties together.
 - The mediator will clarify the issues for discussion and guide the participants to discuss each issue in detail.

- From time to time, the mediator may hold private sessions with each party and their lawyer. The aim of these meetings may be to invite a party to voice matters that they choose not to discuss in joint sessions, to consider the strengths and weaknesses of legal claims or to package offers for presentation to the other party.
 - Offers will be exchanged and attempts made to reach a final agreement.
 - If agreement is reached, the outcome of the litigation will be formalised through Consent Orders, a Deed of Release or Notice of Discontinuance. This documentation may be completed at the mediation or later by lawyers.
- Parties are encouraged to participate directly in the mediation process, but may choose to have their lawyer speak on their behalf.
 - The legal expertise of lawyers and mediators is vital to the court-connected mediation process. Legal experts will assist parties to test the degree to which any proposed outcomes are in accordance with their legal rights and responsibilities. Parties are free to agree to any outcomes that they choose, whether or not they accord with legally available outcomes.

The Rules of the Supreme Court provide that parties may agree to depart from any guidelines made by the Chief Justice in relation to mediation.⁸⁵ Therefore, guidelines could be more prescriptive than those outlined above. However, it is recommended that the Court make statements that, whilst providing information about ‘usual’

⁸⁵ *Rules of the Supreme Court 2000* (Tas) r519(3).

process, also extend an opportunity to disputants to adapt the mediation process to their individual circumstances. This would address the findings that on the one hand there is scope for more responsive, self-determined and cooperative practice within the programme but on the other hand, lawyers had limited awareness of this potential. This approach accords with the recommendation by Riskin and Welsh that both 'standard' and 'custom' mediation be offered.⁸⁶

3.1.2 Meeting obligations to provide a fair process

The second group of recommendations for the Court relate to its obligation to provide a fair process. There is scope for competitive behaviour and unfairness in process to be addressed more forcefully within the programme. There is a need to clarify the obligations of participants and improve quality control.

It is recommended that the Court clarify the obligations of participants by adopting rules through generic guidelines and written agreements to mediate.⁸⁷ Such rules would empower mediators, lawyers and parties to monitor, challenge and respond to inappropriate behaviour within mediation. The Agreement to Mediate is a valuable tool to secure commitment to the mediation process and agreement to ground rules. The publishing of guidelines for participant behaviour not only clarifies expectations, but also provides a means of measuring the fairness of the mediation process.

⁸⁶ Leonard L. Riskin and Nancy A. Welsh, 'Is That All There Is?: The Problem in Court-Oriented Mediation' (Unpublished paper) <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&content=nancy_welsh> (20th August 2009), 63-65.

⁸⁷ Clearer guidelines for lawyers, litigants and mediators were also recommended by Sourdin (2009), above n63, Recommendation 4.

Guidelines for mediator conduct

There are already some generic guidelines for mediator conduct. The Australian National Mediator Standards contain detailed requirements for mediators who are accredited under that system.⁸⁸ These include provisions relating to impartial and ethical practice, and procedural fairness.⁸⁹ An example relating to impartial and ethical practice is:

The perception by one or both of the participants that the mediator is partial does not in itself require the mediator to withdraw. In such circumstances, however, the mediator must remind all parties of a right to terminate the mediation process.⁹⁰

This provision clearly states what the mediator's obligations are if an allegation of bias is made during the process. Such clarification would provide valuable information for participants about what to expect when concerns are raised about inappropriate mediator behaviour.

It is useful to reflect upon the whole of Standard 9, relating to procedural fairness, because this is an area that was identified as requiring particular attention in the Supreme Court of Tasmania's programme:

- 1) A mediator will support the participants to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent.
- 2) The mediator will provide each participant with an opportunity to speak and to be heard in the mediation, and to articulate his or her own needs, interests and concerns.
- 3) If a mediator, after consultation with a participant, believes that a participant is unable or unwilling to participate in the process, the mediator may suspend or terminate the mediation process.

⁸⁸ *Australian National Mediator Standards: Practice Standards* (National Mediation Conferences Limited and Western Australian Dispute Resolution Association, 2007) ('The Practice Standards').

⁸⁹ The Practice Standards, above n88, Standards 5 and 9.

⁹⁰ The Practice Standards, above n88, Standard 5 (5).

- 4) The mediator should encourage and support balanced negotiations and should understand how manipulative or intimidating negotiating tactics can be employed by participants.
- 5) To enable negotiations to proceed in a fair and orderly manner or for an agreement to be reached, if a participant needs either additional information or assistance, the mediator must ensure that participants have sufficient time and opportunity to access sources of advice or information.
- 6) Participants should be encouraged, where appropriate, to obtain independent professional advice or information.
- 7) It is a fundamental principle of the mediation process that competent and informed participants can reach an agreement which may differ from litigated outcomes. The mediator, however, has a duty to support the participants in assessing the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with the participant's own subjective criteria of fairness, taking cultural differences and where appropriate, the interests of any vulnerable stakeholders into account.
- 8) The primary responsibility for the resolution of a dispute rests with the participants. The mediator will not pressure participants into an agreement or make a substantive decision on behalf of any participant.⁹¹

Again, these provisions make the mediator's obligations in relation to procedural fairness plain. It may be that some of these guidelines would benefit from some adaptation to the court-connected context. For example, (6) may be restated to acknowledge that parties are usually legally represented in the programme, but recognise the right of self-represented litigants to obtain advice or information. The context of the Court also requires some adaptation of (7). The Court's obligation to the administration of justice limits the degree to which parties should be encouraged to make agreements based upon their own values. It is true that mediating parties are not restricted to legally available outcomes. However, the dilemma of court-

⁹¹ The Practice Standards, above n88, Standard 9.

connection requires that there is reference to the law in the court-connected mediation process.

The Court could either create its own guidelines for mediator behaviour or require its mediators to become accredited under the National Mediator Standards. Either way, it is recommended that guidelines for mediator behaviour be made available to lawyers so that they can perform their role of monitoring it.

Guidelines for lawyer conduct

It is also recommended that the anticipated role of lawyers within the programme be clarified through the adoption of guidelines. The Law Council of Australia's guidelines for lawyers include provisions relating to the lawyers' overall role, ethical issues, preparation for mediation, during mediation and after mediation.⁹² Some of the guidelines that might steer lawyers' practices in new directions in the Court's mediation programme include:

5) Preparing for mediation: Preparation for mediation is as important as preparing for trial. A lawyer should look beyond the legal issues and consider the dispute in a broader, practical and commercial context.

...

6) At the mediation: Mediation is not an adversarial process to determine who is right and who is wrong. Mediation should be approached as a problem-solving exercise. A lawyers' role is to help clients to best present their case and assist clients and the mediator by giving practical and legal advice and support.⁹³

⁹² Law Council of Australia 'Guidelines for lawyers in mediations' (LCA, 2007).

⁹³ Law Council of Australia (2007), above n92.

Again, the Court could create its own guidelines for lawyers or could adopt the Law Council of Australia's guidelines. It is recommended that in addition to guidelines being adopted, they are provided to legal practitioners.

Guidelines for party conduct

The Court may also consider creating some guidelines for party behaviour in mediation. The Law Society of New South Wales' Mediation and Evaluation Information Kit contains an example of provisions relating to parties' cooperative obligations:

6) The parties must cooperate with the mediator and each other during the mediation to achieve a mutually satisfying outcome to their dispute.

7) Each party must use its best endeavours to comply with reasonable requests made by the mediator to promote the efficient and expeditious resolution of the dispute.⁹⁴

Although no one can be forced to cooperate in mediation, such guidelines provide grounds for complaint, challenge, or discontinuation of the process on the basis of uncooperative behaviour by a party.

Written agreements to mediate

In addition to the adoption of guidelines for participants in mediation, it is recommended that the Court consider introducing written Agreements to Mediate. Such agreements provide an opportunity to draw individual participants' attention to their obligations. It would also mean that each participant has committed to adhere to the mediation ground rules, notwithstanding that they might not have freely consented to the referral to mediation.

⁹⁴ Law Council of Australia (2007), above n92, Precedents: Mediation Rules, 6 and 7.

The advantage of using written Agreements to Mediate as well as more generic guidelines for practice, is that where parties want to adapt the process to suit their particular circumstances, this could be reflected in the agreement. For example, whether or not the parties agree to mediator evaluation could be stated in an Agreement to Mediate (see discussion in 3.1.3 below).

Quality control measures

Further action is recommended from the Court in respect of quality control. It is not asserted that the findings demonstrate poor quality in the programme. The findings demonstrate that the Court has paid inadequate attention to process quality and this has implications for its obligations to ensure that the process is fair. This recommendation accords with that of McAdoo and Welsh, who noted:

In some sense at least, courts are delegating one of their judicial functions to court-connected mediators. The courts ultimately should remain accountable for their delegates' performance. Therefore, effective monitoring and evaluation, including ethical requirements and grievance procedures, should always accompany court-connected mediation programmes.⁹⁵

The Court must actively supervise processes conducted under its authority, even if those processes are private.⁹⁶

The Court needs to improve the way it monitors the fairness of the mediation process. It is recommended that this is done by gathering feedback from participants about their experiences of the programme. Confidentiality would not prevent such a

⁹⁵ McAdoo and Welsh (2004-2005), above n81, 427.

⁹⁶ Bobbi McAdoo and Art Hinshaw, 'The Challenge of Institutionalising Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri' (2002) 67 *Missouri Law Review* 473, 535.

measure, because the *Alternative Dispute Resolution Act* permits mediators to disclose information obtained in connection with a mediation ‘for the purpose of statistical analysis or evaluating the operation and performance of mediation... processes.’⁹⁷ This provision also leaves scope for the creation of a complaints mechanism in relation to court-connected mediation, which is also recommended.

Reference can be made to evaluative mechanisms that have been used in other court-connected mediation programmes. For example, Sourdin and her colleagues have developed a participant survey that has been used across a number of evaluative studies, including the recent investigation into the Supreme and County Courts of Victoria.⁹⁸ This survey could be issued to participants in all court processes, including trial, judicial settlement conference and neutral evaluation. A broader application would provide comparative data that would enhance the ability to evaluate the mediation programme. Furthermore, the replication of questions asked in other jurisdictions would provide another layer of comparison and evaluation. Questions relating to disputants’ experiences of the fairness of the mediation process might include the following:

11) During the process that was used to finalise your dispute, if a judge or mediator was involved, were both sides treated equally or was one side favoured? (Both sides were treated equally/My side was favoured/The other side was favoured).

⁹⁷ *Alternative Dispute Resolution Act* 2001 (Tas) s11(f).

⁹⁸ A copy of the survey is contained in Appendix F of Sourdin (2009), above n63. The other studies that used this instrument included: Tania Sourdin and Tania Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (La Trobe University and the Law Society of New South Wales, Melbourne, 2004); Jane Elix and Tania Sourdin, *Review of the Financial Industry Complaints Service 2002 – What are the issues?* (Community Solutions, La Trobe University, University of Western Sydney, 2002).

12) How strongly do you agree or disagree with the following statements? (Strongly disagree/Disagree/Agree/Strongly agree)...

- I was able to participate in the process.
- The process was fair.
- I felt I had control during the process.
- I would have liked to participate more during the process.
- I felt I had control over the outcome of my dispute.
- I felt pressured to settle my dispute.
- There was enough time to present/discuss all necessary information.
- I felt comfortable during the process.
- I felt I was treated with respect during the process.⁹⁹

By gathering information about participants' experiences of fairness, the Court would be able to demonstrate whether the mediation process is meeting its obligations of fairness without imposing on the privacy of mediation.

The present research has not offered a view from disputants about their experiences of the mediation process. The Court is in a unique position to seek feedback from parties to litigation. Such feedback would provide further insight into the mediation programme, particularly about the degree to which lawyers' practices that have been identified in this research are problematic from disputants' points of view.

Complaints mechanism

In addition to gathering feedback from participants, it is recommended that the Court introduces some formal mechanisms to enable dissatisfied participants to complain

⁹⁹ Sourdin (2009), above n63, Appendix F, 198-199.

about their experiences at mediation. It may be sufficient to invite concerned participants to discuss their complaint with the mediator involved or the Registrar. There could be an obligation imposed on mediators to inform the Registrar if a complaint has been made. The complaint could then be considered with a view to improving performance and addressing participants' concerns. It would also be good practice to inform the complainant of any action taken or other response to the complaint.

3.1.3 Enhancing disputants' choices

The final set of recommendations for the Court relate to the scope for more informed choices to be made by participants about mediation. The finding that lawyers actively modify their clients' expectations about the scope of mediation demonstrates the need for mediators to make direct inquiry with disputants about their goals and process preferences.¹⁰⁰ The variety of styles that are conducted under the umbrella of the Court's mediation programme should be acknowledged in some way, to alert legal practitioners and disputants to the opportunities that are available. Furthermore, it may be useful to provide more information about the mediators who work within the programme, including information about their expertise and their practice styles, to facilitate informed choices. Both case by case and general responses could be made by the Court. Responses include the introduction of a pre-mediation practice, definition of mediators' practice styles and some guidelines relating to process options.

¹⁰⁰ Relis also identified the need to distinguish between lawyers' and disputants' goals and preferences. Relis (2009), above n63, 254.

Pre-mediation processes

It is recommended that the Court conduct separate pre-mediation meetings between mediators and participants for each side. This practice has been introduced into the Court in some cases.¹⁰¹ At pre-mediation meetings the mediator could clarify from disputants their aims, the issues that they would like to discuss and the contributions that they are hoping the mediator will make. The Agreement to Mediate mentioned in [3.1.2] above could also be signed by the parties and their lawyers. The mediator could provide information and answer any questions about the process. The pre-mediations would also be an opportunity to determine who should attend and whether any information ought to be exchanged prior to the mediation date.

The potential for the process to respond to the individuals involved would be enhanced by a pre-mediation process. Riskin and Welsh have also recommended that court-connected mediation providers invite litigants themselves to reflect upon and select the issues that will be discussed in their mediations, thereby defining the scope of discussions.¹⁰² It may be that the scope of mediation would remain limited to the legal issues in many matters. However, a pre-mediation meeting would provide an opportunity for mediators to ask disputants directly about their wishes and make sure that the potential for mediation to deliver responsiveness was heightened. They could identify whether the case was one that should proceed in the ‘usual’ style or whether it was one that would benefit from a focus on non-legal concerns. If so, the proposed process would be explained to disputants and their lawyers, including the roles that

¹⁰¹ See Chapter 4, n153.

¹⁰² Riskin and Welsh (unpublished paper), above n86, 46-52.

they would play. The building of rapport with disputants may also impact positively on direct disputant participation.

The changed practice recommended above would shift decision-making about the scope of court-connected mediation from lawyers to their clients. When disputants are presented with an opportunity to determine which issues will be discussed, their lawyers may provide some advice to guide those choices. For example, if an insurer is attending mediation for a defendant, some non-legal issues may not be capable of resolution within the mediation process. If so, alternative routes for satisfaction of the clients' non-legal interests, such as their relationship with a former employer or emotional distress in coping with injuries, might be identified.

Distinction between mediators' styles

It is also recommended that the Court draw distinctions between the styles of its mediators and facilitate choices between those styles. The diversity of mediator styles offers an opportunity to request a particular mediator where that mediator's style would suit the clients' aims. However, in the absence of express acknowledgement of the different styles of the mediators, it is difficult for lawyers and disputants to make informed choices between mediators. Furthermore, it is not clear whether client or lawyer preferences were driving the choice of mediator, where it was exercised. Nonetheless, a clearer distinction between practice styles or an opportunity to discuss preferences with the mediator prior to mediation would facilitate a greater opportunity for disputants to define the issues to be discussed.

Macfarlane and Keet also proposed that lawyers be provided with a choice amongst the available cadre of mediators.¹⁰³

The Court's website might be an appropriate place to publish a profile of each mediator. The profiles would include information about the mediators' backgrounds, areas of expertise, any specialisation and whether or not the mediator conducts case evaluation as part of his or her practice. This information would facilitate choices between the mediators.

It is important that mediators reinforce the choices that participants have made by outlining the nature of the process and the roles of the mediator, lawyers and parties at pre-mediation sessions and at the commencement of joint mediation sessions. This would manage expectations and educate participants about the choices available to them.

This research has not demonstrated any particular concern about the current pool of mediators. However, an expanded pool of mediators could be a means of enhancing disputant choice. For example, if the Court wanted to expand its capacity to conduct interest-based, facilitative mediation in appropriate cases, then it may be valuable to seek mediators with particular strengths in that style of practice. Private mediators who practice primarily outside the court-context are less likely to be entrenched in

¹⁰³ Julie Macfarlane and Michaela Keet, 'Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program' (2005) 42 (3) *Alberta Law Review* 677, 695.

legalistic approaches to mediation and may be a valuable addition to the Court's pool.¹⁰⁴

Guidelines about the nature of mediation at the Court

It is recommended that the Court produce some guidelines which explain the range of mediation styles that are practised within its programme. The mediators distinguished between two groups of matters and the Court should make the different practices between case types known to users. One option available to the Court is to restrict an interest based approach and extensive direct disputant participation to particular categories of cases. The mediators' practice reported in this research was to consider a tailored style of mediation in estate, relationship, non-debt recovery commercial matters and negligence matters where the professional alleged to have been negligent was involved. These kinds of matter were sometimes tailored on a case by case basis. Even if no change in practice is proposed, the current practice should be clearly expressed in some way to inform participants.

Furthermore, not all mediators reported that they evaluated cases. Those who did evaluate did not do so in every case. It would be beneficial to mediation programme users if they were aware of the range of processes that are available within the programme. This would facilitate an understanding of the process as well as informed choice.

¹⁰⁴ Sourdin has recommended a combination of court-based and private mediators to decrease the impact of litigation culture within court-connected programmes. Sourdin (2009), above n63, Recommendation 4.

There are several options available to the Court to distinguish between its mediation processes. One option is to define mediation with reference to practice models such as ‘facilitative’, ‘expert advisory’, ‘wise counsel’ or ‘transformative.’ Such distinction would avoid the ambiguity of using ‘mediation’ alone without qualification. However, the problem with categorising the Court’s mediation processes in this way is that it may ‘lock’ mediators into practising a single model within each mediation. This is not only contrary to the reality of mediation practice but also fetters the flexibility of the process to adapt to circumstances as they change.

Another approach would be to describe mediation with reference to variables. Wade has published a mediation abacus which demonstrates this way of describing mediation.¹⁰⁵ The benefit of expressing mediation variables as individual characteristics falling along a continuum is that the complexity of mediation practice is acknowledged. Another example of expressions of mediation that acknowledge these complexities is Riskin’s work, which was discussed in Chapter 2.¹⁰⁶

A simpler way for the Court to describe the variation within its mediation programme would be to adopt Riskin and Welsh’s suggestion that court-connected mediation programmes could offer two kinds of process, ‘standard mediation’ and ‘custom mediation.’¹⁰⁷ Custom mediation would not be a rigid category but would be

¹⁰⁵ John Wade, *Representing Clients at Mediation and Negotiation* (2003, Dispute Resolution Centre, School of Law, Bond University, Queensland, Australia) 28-30.

¹⁰⁶ Leonard L. Riskin, ‘Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed’ (1996) 1(7) *Harvard Negotiation Law Review* 7; Leonard L. Riskin, ‘Who Decides What? Rethinking the grid of mediator orientations’ (2003) 9 *Dispute Resolution Magazine* 22. See Chapter 2 [3.3.1].

¹⁰⁷ Riskin and Welsh (unpublished paper), above n86, 63-65.

shaped on a case by case basis. This kind of distinction would be consistent with the recommendations in [3.1.1] above regarding clarification of process.

3.2 The legal profession

This research has demonstrated a clear need for lawyers to obtain both increased awareness about the potential benefits that might be pursued through mediation and skills that could be applied to the mediation context. In light of the evidence that lawyers appreciate outcomes that satisfy a range of their clients' interests, some expansion of lawyers' ideas about the potential scope of mediation would be beneficial. Lawyers may need some guidance about how to actively pursue outcomes that satisfy a range of their clients' interests. Although they appreciated the possibility of such outcomes, they were not actively pursued.

3.2.1 Knowledge of the breadth of the mediation field

Lawyers ought to have a clear understanding of the breadth of the mediation field. This would enable them to advise their clients accurately about the processes that are available and to make recommendations about characteristics that would best meet their clients' aims. In order to choose appropriately between mediation styles, it is essential that legal practitioners understand the differences between various models of mediation, the aims promoted by different models and the strengths and weaknesses of each. Increased awareness about the variety within the mediation field would also enable lawyers to seek particular mediator techniques. This recommendation is made regardless of the choices that are made by the Court in relation to its programme. Lawyers have a professional obligation to provide advice

to their clients about the appropriate processes to respond to their circumstances.

Unless lawyers have an accurate and comprehensive understanding of the breadth of the modern mediation field, it would be difficult for them to discharge this duty.

It is also desirable that lawyers obtain an improved awareness of the potential benefits of direct disputant participation, so that these benefits could be considered and weighed against perceived risks. Lawyers' litigation management has been identified in this research as a significant obstacle to direct disputant participation in the Court. The Court has a limited opportunity to address the control that lawyers exercise over the direct participation of their clients. As a starting point, it is recommended that lawyers do not assume that their clients want them to act as spokespersons in court-connected mediation.¹⁰⁸

3.2.2 Dispute resolution skills

Furthermore, to achieve the potential benefits of mediation for their clients, lawyers need to expand their 'tool boxes' and obtain a suite of dispute resolution skills. The findings suggest that some lawyers may need new skills of dispute diagnosis, including listening for a broader range of their clients' interests than legal issues. Skills in interest based negotiation would also better equip lawyers for a range of negotiation and mediation practices. Lawyers need mediation specific skills and knowledge, including an understanding of the mediator's obligations, how to work with clients rather than for them and how to negotiate in the presence of clients and a

¹⁰⁸ John Lande, 'How Will Lawyering and Mediation Practices Transform Each Other?' (1997) 24 *Florida State University Law Review* 839; Alex Hurder, 'Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration' (1996) 44 *Buffalo Law Review* 71.

mediator. For many lawyers, a new model of legal practice is required, so that they can pursue their clients' interests appropriately.¹⁰⁹

It is ultimately up to individual members of the legal profession to equip themselves adequately for mediation representation. However, a number of recommendations are made here to provide opportunities to lawyers to increase their awareness and skills in mediation. Riskin has recommended that steps are made to make the bar and the bench aware that there are different kinds of mediation, to remind them that mediation can do more than simply settle cases.¹¹⁰

A variety of practices and perspectives were identified within the Tasmanian legal profession in this research. Lawyers learn from one another during the mediation process, but because it is private, they cannot usually observe mediations other than their own. It is suggested that lawyers would benefit from a sharing of the different perspectives and practices amongst them. A conversation about different practice styles would be an opportunity for lawyers to expand their understandings about the ways they might approach their role and thereby improve their mediation practice. This sharing could be facilitated through a seminar, perhaps with a panel of lawyers who adopt a variety of approaches to mediation giving presentations, followed by general discussion. The Law Society of Tasmania, together with the Supreme Court of Tasmania, could conduct such a seminar programme. It is also suggested that a

¹⁰⁹ Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (2008).

¹¹⁰ Riskin in James Alfini, John Barkai, Robert Baruch Bush, Michelle Hermann, Jonathon Hyman, Kimberlee Kovach, Carol Liebman, Sharon Press and Leonard Riskin, 'What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions' (1993-1994) 9 *Ohio State Journal on Dispute Resolution* 307, 325.

cross section of mediators, including Court mediators and private mediators whose practice is primarily in non-court related settings, be involved in the seminar programme. They could offer insight into their practice styles and thereby increase awareness of the mediation field and the kinds of mediation that are practised in Tasmania.

3.2.3 Legal education

It is also recommended that legal educators attend more to the dispute resolution education of law students. Legal education does not traditionally equip lawyers with a broad perspective of dispute resolution and the variety of approaches it encompasses.¹¹¹ In many Australian law schools there has been marked change in the approach to dispute resolution education over the past three decades, concurrent with the emergence of modern dispute resolution within and outside the legal system.¹¹² However, the main emphasis remains on advocacy skills rather than negotiation and cooperative skills. In 1998 the Council of the Law Society of New South Wales recommended that:

¹¹¹ Some guidance about the 'core' content of Australian law degrees is described on the Council of Australian Law Deans (CALD) Website. See for example 'General Aims of legal education in Australia' <www.cald.asn.au/slia/Legal.htm#General> at 28th July 2008; 'Revised Uniform Admission Rules' <www.cald.asn.au/docs/Revised%20Uniform%20Admission%20Rundle.pdf> at 28th July 2008.

¹¹² Law school educational approaches have changed since the Pearce Report in 1987. See Associate Professor Sally Kift, 'For Better or Worse?: 21st Century Legal Education' (Paper presented at the LawAsia Downunder 2005 Conference, Gold Coast, 20-24th March 2005) citing D Pearce, E Campbell and D Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission' Canberra, ACT, Australian Government Publishing Service, 1987 and Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89), AGPS, Canberra, 1999.

Dispute resolution should be a compulsory and separate component of the undergraduate law program and diploma of law course and integrated into other core and elective subject areas where relevant.¹¹³

There is scope for the undergraduate law degree at the University of Tasmania to increase the compulsory dispute resolution component within its law degree.¹¹⁴ It is important that law schools prepare their students to operate within the modern dispute resolution environment, which has a strong emphasis on settlement and consensual dispute resolution processes. Lawyers need a suite of adversarial and non-adversarial skills in order to maximise the quality of their legal practice.

Many practising lawyers have received little training in mediation or the lawyers' role in it.¹¹⁵ Legal practitioners could be encouraged to seek further education in mediation skills and techniques through professional development programmes. Again, it may be appropriate to look within the ranks of the local legal profession and invite practitioners who are particularly skilled and effective in mediation to share their techniques with other lawyers.

There are some recommendations for altered practices within the Supreme Court of Tasmania's mediation programme. Mediators could play an educative role in pre-mediation processes by presenting a range of choices about process characteristics to

¹¹³ Council of the Law Society of New South Wales, 'Early Dispute Resolution (EDR) Task Force Report' (Law Society of New South Wales, 1998), Recommendation 5.

¹¹⁴ Chapter 4 [4.3.2].

¹¹⁵ Chapter 4 [4.3.2]; Archie Zariski, 'Lawyers and Dispute Resolution : What Do They Think and Know (And Think They Know)? - Finding Out Through Survey Research' (1997) 4(2) *Murdoch University Electronic Journal of Law* 1 <<http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html> (27 May 2004)>; Nadja M Spiegel, 'Queensland Lawyer Attitudes Towards Mediation - Implications for Training and Education' (1998) *National Law Review* 1 <www.lexisnexis.com.au/nlr/articles-files/mediate/article.pdf>.

legal practitioners. Mediators could assist them to match disputant aims to process characteristics. It is also recommended that lawyers ensure that they have a clear understanding of the mediator's role so that they can monitor mediator behaviour during the process.

3.3 Court-connected mediation generally

There are some broad recommendations that can be applied to court-connected mediation generally.

The dilemma of court-connection means that efficiency alone is an inappropriate measure of the success of a court-connected mediation programme. Fairness must also be delivered through court-connected mediation processes. It is vital that court-connected mediation programmes have quality control measures in place to monitor what is occurring within them. Courts should take a keen interest in the fairness of processes that are conducted under their supervision. Because mediation is private, the most appropriate measure of fairness is participant feedback.

All court-connected programmes should produce clear guidelines about the purpose, scope and nature of the process(es) that will be conducted in mediation. Mediation is far from generic and it cannot be assumed that a particular style of mediation will be practised. Although there are tendencies in court-connected mediation practice, there is scope for flexibility to be preserved. Alternatively, courts may choose to limit the scope of their programmes. Each programme should provide a clear statement of the choices that have been made in relation to that programme.

3.4 Theoretical constructs of mediation

The findings of this research do not demonstrate a need to review theoretical constructs of responsiveness, self-determination or cooperation as they apply to the court-connected context.

Court-connected mediation departs from the priority of purposes that are promoted in mediation literature by promoting legal concerns over non-legal considerations.¹¹⁶ Nonetheless, non-legal issues may be discussed within a court-connected mediation process. Some of the special features of court-connected mediation in civil cases which distinguish it from mediation in other contexts are:

- The parties may be ordered to attend mediation.
- The legal issues will be discussed and proposed outcomes will be measured against the likely legal outcome.
- Lawyers usually attend with their clients.
- Lawyers manage the discussion of the clients' legal case.
- Trial is a realistic alternative to settlement.
- The aim is to finalise litigation rather than to make interim temporary agreements.
- Any agreement will be converted into a legally binding form.

There may be some value in acknowledgement of these characteristics in mediation literature when building expectations about court-connected mediation. However, every mediation context produces special characteristics, which form part of the rich

¹¹⁶ Chapter 2 [3.2.1], [3.2.2], [3.2.3].

diversity in the mediation field. The theoretical constructs as described in Chapter 2 do not require adjustment, because they acknowledge and are built upon the diversity within mediation.

Legal issues do take some priority within court-connected mediation, but it is concluded that the dilemma of consistency may be resolved through the giving of legal advice, primarily by lawyers. Consensual outcomes are not required to adhere to the law. Such a resolution of the dilemma forms a mid-point between the duty to apply the law at trial and the absence of that duty in unassisted negotiations.

The indicators of responsiveness are: flexibility regarding process and an opportunity for the interests and preferences of individual disputants to be explored. Some evidence of both of these indicators was found in the Court's programme. The narrowing of the scope of court-connected mediation was found to be a result of lawyers' practices rather than an inevitable consequence of court-connection. There is therefore scope for court-connected mediation to respond to a broader range of disputants' interests.

Similarly, the self-determinative potential of court-connected mediation has been found to be limited by lawyers' practices of actively restricting the extent of their clients' participation in the mediation process. Lawyers impose their own concerns about the risks of direct disputant participation on their clients, thereby driving decisions about participation. Because this research does not have the benefit of the disputant voice, it does not demonstrate whether lawyers' preference for a

spokesperson role is contrary to disputants' preferences. The significance of the impact on self-determination is therefore difficult to determine conclusively. In any event, a variety of lawyers' practices were found and it is not inevitable that disputant participation will be restricted. There is no need to restrict theoretical expectations about self-determination in court-connected mediation.

Court-connected mediation also has as much capacity to be a forum for cooperative interactions as mediation in other contexts. A mixture of practices was observed. There are some factors that discourage cooperation, but individuals can nonetheless choose to cooperate.

4 Conclusion

This thesis has considered the unique form of mediation conducted within the context of the civil justice system. When mediation is practised under its supervision, a court has a responsibility to monitor fairness and to ensure that the law is applied to disputes during the decision making process. The primary means of discharging these duties in private consensual processes is through quality control and clear guidelines for practice. This research, although it did not set out to evaluate or criticise, demonstrates that the Supreme Court of Tasmania has inadequate quality control measures and no guidelines for mediation practice. This has serious implications for the administration of justice. The Court has effectively abrogated its responsibility to deliver fairness to the lawyers, mediators and parties who participate in its mediation programme. The reports of unfairness by some members of the legal

profession make plain the need for immediate action from the Court. Guidelines for mediation practice and formal quality control measures are essential components of any court-connected mediation programme.

The theoretical foundations of the mediation field informed the observation of the mediation process in the Supreme Court of Tasmania. The inherent dilemma of court-connection necessarily influences the nature of mediation when it is conducted within the litigation context. Nonetheless, court-connected mediation is not restrained from delivering some degree of responsiveness, self-determination and cooperation, which are core features of the mediation process and transcend the differences between theoretical notions of mediation. These core features are delivered to disputants through opportunities to explore a range of their own interests, participate directly and cooperate. This thesis has demonstrated that these key opportunities are denied to many disputants in the Supreme Court of Tasmania. Instead, there is an almost exclusive focus on legal issues, disputants are discouraged from direct participation and non-cooperative behaviours are evident.

Theoretically, for mediation to respond to disputants' individual preferences there must be an opportunity to explore a range of disputants' interests, both legal and non-legal. The case study of mediation in the Supreme Court of Tasmania has demonstrated the high priority of legal issues in court-connected mediation. Non-legal concerns are rarely discussed. However, non-legal issues are not excluded from consideration by the Court or mediators. Although court-connection does impose a rightful emphasis on the law into the mediation process, the potential of court-

connected mediation is limited more by lawyers than by court-related factors. It is lawyers who restrict the scope of mediation in the Court. The limitation of scope by lawyers is problematic because it departs from the apparent intention of the Court and may conflict with disputants' preferences. The Court should make a clear statement of intention in relation to the appropriate scope of mediation within its programme. If it intends to deliver the opportunity to explore individual non-legal interests then that intention should be made explicit.

The theoretical foundation of self-determination requires that mediation revolves around the disputants. They must have a real opportunity to participate directly in the process in order for the process and outcomes to be self-determined. This research has demonstrated clearly that disputants play a limited role in mediation at the Court. Lawyers manage and actively restrict their clients' participation. Lawyers are alert to the potential impact of disputants' contributions on the strength of legal arguments. Lawyers' control over decisions about disputant participation has significant implications for the self-determinative potential of mediation. The context of the litigation process, managed by lawyers, restricts the capacity for the Court to intervene in lawyer-client relationships. Court-connection does not, however, necessarily limit direct disputant participation. Education of the legal profession about the possibilities of court-connected mediation and the potential benefits of direct disputant participation is necessary to facilitate change in this regard. Similarly, the cooperative potential of the court-connected mediation process may be realised through improvement of lawyers' awareness and skills in regard to mediation processes.

The lawyers who participated in this research demonstrated a lack of awareness and understanding of mediation theory, purposes and practice. This is unsurprising given that the Court's mediation programme evolved without reference to the theoretical bases of mediation. Rather, the emphasis was on institutional efficiency with scant attention to the implications of the introduction of a private, consensual, problem-solving, disputant-centred and cooperative process into the adversarial litigation system.

The research demonstrates that lawyers perceive court-connected mediation as part of the litigation process and that the purpose of mediation is to promote the efficient settlement of legal disputes. This aim is not of itself problematic. The problem is that lawyers' practices demonstrate that disputants' aims and preferences are not necessarily driving court-connected mediation processes. This departs from the essence of mediation as a disputant-centred process. Lawyers demonstrated a limited understanding of how they could support their clients to maximise the potential of mediation.

There is clearly a need for court-connected mediation to have improved clarity of purpose, scope and process at a programme level and an increased focus on disputants. Otherwise, the departure of court-connected mediation practice from the theoretical foundations of the mediation field will remain unchecked. This gap has implications for the potential for extra-legal benefits of mediation to be realised within court-connected mediation programmes. However, a greater concern is the

fact that if they fail to clarify the purpose, scope and process of their court-connected mediation programmes, courts are in danger of failing to meet their obligations towards the administration of justice. Without clear guidelines, the quality of the mediation process cannot be monitored, managed or controlled.

Appendices

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Appendix A

Lessons learnt from the original research design

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1 Introduction

My original intention was to evaluate the mediation conferencing program against a number of criteria, however because of the inadequate participation in the telephone

surveys there was little contribution from disputants. Without the disputant voice there would be no measure of disputant perceptions of and satisfaction with fairness, process, cost, time, formality, information, participation and outcomes. Nor would it be possible to conclude why matters settled or whether disputants preferred other modes of finalisation. It was decided that the original research aim could not be achieved without direct participation by disputants in the research.

The biggest hurdles in gathering data from disputants were obtaining their contact details and penetrating the lawyer-client relationship to communicate directly with disputants. Ethical constraints prevented direct access to the identity of individuals scheduled to participate in mediation conferences, which made a direct approach prior to the conference impossible. Alternative means of data collection were considered but ultimately attempts to obtain the disputant perspective on the mediation conferencing program were abandoned.¹ The research was redesigned and a new aim formulated.

This Appendix provides details of the procedure adopted for inviting participation in the telephone survey, an explanation for the poor response rates and a comparison of the telephone survey data collection procedures with the procedures adopted for

¹ When it was clear that there were not going to be enough responses from disputants to the telephone survey, one option considered was a personal approach to disputants. That approach would have been in person, at the Court and immediately after the mediation conference. That kind of approach has been successfully used by researchers in other jurisdictions (see for example Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92_text.html>). Time constraints and reports from the mediators that at the conclusion of mediation participants were generally fatigued were the basis for the decision not to attempt a direct approach to disputants. Furthermore, in December 2004 I had attended the Court to observe a number of mediation conferences. I needed to obtain the consent of both legal practitioners and disputants before I could enter the mediation room and observe the process. My experience was that all of the lawyers appeared to be uncomfortable about my talking directly with their clients. Most listened to me explain the situation, took a copy of the information sheet and had a private discussion with their client before coming back to me. They appeared to have a preference for talking to me in the absence of the disputant.

inviting participation in the interviews. It presents the experience of the failed methodology for the benefit of future researchers. It also demonstrates the evolution of the research design in light of obstacles encountered during the research process.

2 The procedure for inviting participation

The procedure adopted for approaching potential participants in the telephone surveys was cumbersome, partly necessitated by ethical considerations. A package of documentation was provided to each of the Court registries including written instructions addressed to the registry secretaries. The Registrar had agreed that the documentation was to accompany the Court's Notice of Mediation that was sent to legal practitioners and self-represented disputants from the Court. The documentation included a covering letter to legal practitioners, an information sheet and consent form for legal practitioners, information sheet and consent form for disputants and a copy of the survey questions to be asked of legal practitioners. The information sheets contained all of the information that the ethics committee required to be provided to potential participants. From February 2005 to June 2006 these documents were sent by the Court together with the Notice of Mediation. Where parties were legally represented the legal practitioner received this package. Lawyers were asked to forward their clients' information sheet, consent form and a copy of the survey of legal practitioners to their client prior to the mediation conference.

Those who agreed to participate in the survey were invited to complete the consent form and either hand it to the mediator at the commencement of the mediation conference or send it to the researcher at the University of Tasmania. Only one

consent form was handed to a mediator, the remaining small number (twenty-six) of consent forms that were received were posted directly to the University. Once a consent form was received, I telephoned the participant to either conduct the survey or arrange for an alternative convenient time.

There were a number of factors contributing to the cumbersome data collection process. The University of Tasmania Human Research Ethics Committee ('the ethics committee') had determined that I could not have access to the identity of the parties to an action that had been referred to mediation.² Therefore, I was unable to obtain contact details and send the documentation myself. The contact details that are available to the court are limited to the address for service, which is generally the legal practitioner's address. The Court does not have a record of the postal address of the disputants. Therefore, the disputants could not be contacted directly by post. In these circumstances the only way to have information distributed by post was to have it sent by the Court, to the address for service. This added several steps in the journey to the intended participants. The documents had to go from registry staff, to the secretary of the legal firm, to the legal practitioner and finally to the disputant. It was expected that this cumbersome process would impact on the response rate achieved, but not to the extent it did.

A number of steps were taken to encourage participation in the survey. I recognised that there was a need to be proactive in this regard. The steps taken were as follows:

² Email from Gino Dal Pont to Olivia Rundle, 2nd August 2004.

- In January 2005 a joint letter from the Chief Justice and the Head of the University of Tasmania Law School was sent to all legal practitioners by the Supreme Court. The letter emphasised the Court's support of the research and strongly encouraged legal practitioners to participate.
- The mediators were provided with spare copies of the information sheets and consent forms in anticipation of participants forgetting to bring them to the mediation conference. A meeting was arranged with each mediator individually to introduce myself, to explain the research and to ask for their cooperation in collecting consent forms and promoting the research.
- In May 2005 a memo was sent to each of the Supreme Court mediators again asking for their cooperation by both encouraging participation in the 20 minute telephone survey and collecting consent forms at the conference where possible.
- A notice about the research appeared in the Winter 2005 edition of the *Law Letter*, a magazine of the Law Society of Tasmania.³ The notice sought the support of legal practitioners by participation in the survey. It was signed by the Registrar of the Court.
- I wrote an article for the Summer 2005 edition of the *Law Letter*, which promoted the benefits of lawyer participation in dispute resolution evaluation.⁴

Unfortunately, these actions did not improve the very disappointing response rate. A total of twenty-seven consent forms were received. According to the Court's database, over the period between 1st February 2005 and 30th June 2006, 349 mediations were conducted. Based on the minimum of two disputants at each

³ Ian Ritchard, 'Supreme Court Mediation: Evaluation Project Needs Your Assistance' (2005) (88) *Law Letter* 8.

⁴ Olivia Rundle, 'Evaluating Dispute Resolution' (2005) (90) *Law Letter* 10.

mediation and an assumption that all of them were legally represented, the pool of potential participants in the telephone survey was about 1396. Based on that figure, less than 2% of the potential pool agreed to participate in the research.

3 Explanation for poor response rates

Factors contributing to the poor response rates included those arising from distribution by the Court and action or inaction by legal practitioners, disputants and mediators. The most frequent explanation provided to me by the legal practitioners for non-participation, was that the research documentation was very low on their list of priorities. It was a task that would not advance their client's case and, therefore, was categorised as something that could be done if there was time, which usually there was not.⁵

Reliance on the Court administration exposed the research to human error from third parties. It came to my attention in August 2005 that the court file number was not always being filled out on the documentation before it was sent to legal practitioners. I spoke to the registry secretary involved in August 2005 and explained the importance of filling in the court file number before the documents were sent.

The second reason for poor response rates by disputants was that documentation was not sent to disputants by legal practitioners. Confusion, inaction, frequency of requests and the nature of the surveys were the main contributing factors. Confusion arising from the absence of a file number on the documents is one causal factor for

⁵ During my subsequent interviews of legal practitioners I asked many of them whether they remembered receiving documentation in relation to my research and if they did remember, what they did with it.

documents not being sent to disputants by their lawyers. Even where the court file number did appear on the documents, it is possible that they were separated from the Notice of Mediation. Legal practitioners generally refer to their cases by the names of the parties to the action rather than court file numbers and may have encountered difficulty identifying the matter to which the documentation related.

Inaction by legal practitioners is another explanation for the low response rate. Contributing factors included apathy, the fact that participation was not compulsory and would not impact on the client's case, a perception that the research was not important, or that what the practitioner had to say was not important, or a perception of being too busy to participate. Forgetfulness or good intentions without action were also contributing factors. Workload prioritisation appears to have been the main reason for the poor participation rates by legal practitioners. Some legal practitioners made a conscious decision not to participate and not to forward documents to their clients. One practitioner contacted the registry staff in February 2005 and requested that no further documents relating to the research be sent to him, as he would not be participating. I asked a number of legal practitioners during interviews about the fate of the documents that had been sent to them. Responses included 'Oh, you're the one who sends out those thingys, I just threw those in the bin.' One practitioner expressed the view that it was not appropriate to send such documentation to a client, as it might bring up underlying dissatisfaction with the settlement amount. If documentation was sent by legal counsel, it might cause the legal practitioner to be a target for the client's dissatisfaction. Ironically, disputant satisfaction post-mediation was a factor that the research was aiming to measure empirically. Another group of practitioners reported that they did send the documentation to their clients, but that

their clients declined to participate. Some disputants instructed their legal practitioner not to participate, but to focus energies on the advancement of their case.

The frequency with which practitioners received the documents also seems to have contributed to their reluctance to respond. Mediators reported that when they inquired, common responses were ‘If I do one, they’ll keep hounding me to do more’ or ‘If I responded to all the forms I get about this, it would take up too much of my time.’ On the other hand, two of the fourteen practitioners who did participate in the telephone survey chose to do so more than once. The fears of being ‘hounded’ were unfounded, but nonetheless appear to have been influential.

Because the telephone surveys each related to a specific mediation, it was necessary to talk about details of the case which were confidential. This may have been a concern despite my assurances about the protection of the confidentiality of the information. It is possible that legal practitioners held their own concerns about discussing a particular case and did not go the further step of obtaining their client’s consent. A number of clients declined to consent to their legal practitioner discussing details of their dispute for the purpose of the research. Many legal practitioners left it up to their client to instruct them to participate, rather than actively seeking their clients’ consent.

The failure of disputants to participate in the telephone survey can be explained by the fact that many of them did not receive the documentation relating to the research. Their legal practitioner did not forward it to them and the mediator did not provide the documentation at the mediation conference. It was intended that mediators would

be the backup source of information about the research for disputants in cases where their lawyers had not provided them with the documentation. The mediators reported great difficulty in finding the ‘right moment’ to bring up the topic of the research. They reported that frequently they forgot to mention the research at the beginning of the mediation conference. In any event, the participants were eager to commence the conference and to explore the possibility of settlement. It was thought that where a break was taken before private sessions, that would be an appropriate time to mention the research. The problem was that more often than not the mediators forgot about the research at that point. The conclusion of the conference was also considered to be a difficult time to mention the research, as the participants were fatigued. I suggested that as a matter of habit the mediators could mention the research at the beginning of each conference. There were reportedly some attempts to do this, but they were generally met with hostile responses from legal practitioners. A typical response was, ‘We just want to get on with this mediation and you’re delaying with procedural matters.’

Mediators and legal practitioners also reported that they often sensed that the disputants were suffering from the effects of a lengthy litigation process and asking them to participate in a survey was just adding another task onto that protracted experience. If their matter had settled at the conference, they simply wished to put the experience behind them. If not, they were feeling demoralised and were unlikely to want to relive the experience through participation in a survey. These perceptions indicate that a proportion of disputants would not have been willing to participate in the survey, even if they were made aware of the research.

It is not possible to determine which of the above explanations were most significant. All that can be said is that they all contributed in some way to the low response rates to the telephone surveys, by both legal practitioners and disputants.

4 Comparison of procedures for inviting participation in the telephone surveys and the interviews

The design of the procedure for inviting participation in the interviews was developed with consideration of the reasons for poor participation rates in the telephone survey. In contrast to the telephone surveys, the invitation for interview was made directly and for a single interview about general experiences of court-connected mediation. Furthermore, the information sheet and consent form were provided in electronic form as attachments to an email, thereby reducing the volume of paper provided.

The then Registrar provided a list of the legal practitioners who represent disputants in civil matters at the Court and each was invited to participate in an interview. The general scope of the interview overcame the obstacle of confidentiality, because legal practitioners were not being asked to talk about the details of one specific case. It also overcame the problem of repeated invitations to participate. Although ‘one time’ disputants would only receive one set of documents relating to the telephone surveys, repeat players such as legal practitioners and insurance representatives received one for every mediation in which they participated over the relevant period.

The final flaw identified with the telephone survey procedure was the lengthy documentation by which potential participants were invited to participate. There is a

requirement that participants be adequately informed about the way the information they share with researchers is collected, stored and destroyed. This is an issue of ethics in research. There are two ways that this could have been overcome, one of which was implemented. If it had been decided to continue approaching potential participants in writing, then the written document could have been reduced to one page, with a reference to a website address. The project website would have contained all of the information relevant to participation, including full information sheets, survey questions for legal practitioners and contact details for inquiries. A draft website was prepared and revised documentation approved by the ethics committee. I recommend that future researchers consider creation, at an early stage, of a project website containing all relevant information for interested parties. The advantages are a reduction in the written information required to be provided, reduction in wasteful use of paper and possibly increased interest in participation.

The procedure adopted for inviting participation in the interviews overcame the need to approach potential participants in writing, by emailing or telephoning legal practitioners to invite them to participate. Email was preferred as the initial contact for three reasons. First, it was less time consuming. Second, the email was concise and personable, with information sheets and consent forms provided as attachments. Therefore, I met my obligations of ethics in research without overwhelming potential participants with paperwork. Finally, an email followed by a telephone call if necessary avoided the disadvantages involved in making ‘cold calls’ at first instance.

I sent a formal letter of invitation to some senior legal practitioners and members of the independent bar in November and December 2006. At that stage I had identified

that a higher proportion of participants from these groups would greatly enhance the research. My supervisors attached a covering note, addressing the recipients by their first name (when they were acquainted with the practitioner) and encouraging their support of the research. This stimulated an increased rate of participation by senior members of the profession, including some who had previously not responded to an email inviting them to participate in an interview. On receipt of a reply to the formal letter, the information sheet and consent form were sent by email. A hard copy of those documents was taken to the interview and practitioners were asked to sign the consent form before the interview commenced.

5 Conclusion

Of the two qualitative data sources adopted in this research, the interview attracted the best participation rate. The procedure for inviting participation in the interviews was developed after the telephone survey procedure was abandoned. It was therefore developed with a better understanding of some research design issues. The failure of the telephone survey procedure was a valuable learning experience that forced a reconsideration of the overall research aim and scope.

Appendix B

Interview Schedules

| | | |
|----------|--|------------|
| 1 | Lawyer interview schedule | 487 |
| 2 | Mediator interview schedule | 492 |

1 Lawyer interview schedule

This interview is in relation to your general experience of mediation at the Supreme Court of Tasmania.

1. Which of the following best describes your main case load?

| | | |
|------------|------------------------------|------------------------------|
| Commercial | Personal Injuries -Plaintiff | Personal Injuries -Defendant |
| Family Law | Mixed practice | Other _____ |

2. Approximately how many mediation conferences have you participated in over the last 12 months?

1-10 11-20 21-30 31-40 41-50 51-60 61-70 71-80 81-90 91or more

3. How frequently do you advise your clients in relation to dispute resolution processes other than litigation?

Always Usually Sometimes Never

4. How frequently do you attempt to resolve your clients' disputes by negotiation (other than during a mediation process)?

Always Usually Sometimes Never

5. How frequently do you advise your clients to participate in mediation?

Always Usually Sometimes Never

6. What difference does mediation in the Supreme Court make to the way you practice?

7. What skills and training does a legal practitioner need to participate effectively in mediation? How are those skills developed?

a. Have you undertaken any formal training in mediation or negotiation?

[This question was asked in a follow up email to many lawyers].

8. How do you prepare yourself and your client for mediation?

9. Which of the following do you typically discuss with your clients to prepare for mediation?

☐ Likely trial outcome

- ☐ Future costs
- ☐ Options for settlement
- ☐ Mediation process
- ☐ Your client's needs regarding outcome

10. Which of the following do you typically do to prepare yourself for mediation?

- ☐ Review the file
- ☐ Consider options for settlement
- ☐ Consider strategies
- ☐ Reflect on the personality of the opposing legal practitioner
- ☐ Find out who's the mediator
- ☐ Consider the needs of the parties

11. How does the degree of preparation you typically make for a mediation conference compare to the preparation you typically make for a trial?

Same amount Slightly less Significantly less No preparation

12. What advantages does the mediation process have?

13. What disadvantages does the mediation process have?

14. What are we losing by having so many cases go to mediation?

15. What are we gaining from so many cases going to mediation?

16. How would a typical mediation work?
17. Describe your best experience at mediation
18. Describe your worst experience at mediation
19. What should remain the same about the Supreme Court's program?
20. What needs to change about the Supreme Court's program?
21. Is mediation as practised in the Supreme Court of Tasmania substantially different from unassisted lawyer negotiation?
22. Is mediation generally substantially different from unassisted lawyer negotiation?
23. Which of the following best describes the legal practitioner's role in court-connected mediation? (You may nominate more than one)
Advocate Advisor Negotiator Other_____
24. Should a mediator ever advise disputants about the value of a claim, or the likely result if the matter proceeded to trial? In what circumstances?
25. Is mediation NOT appropriate in any of the following circumstances?
☐ Before litigation has commenced

- ☐ Where liability is in issue
- ☐ Before completion of pleadings
- ☐ Before completion of discovery
- ☐ Before the matter is certified ready for trial
- ☐ After the matter is certified ready for trial
- ☐ After trial has commenced
- ☐ Where there is an imbalance of power between the parties
- ☐ Where the difference between the positions of the parties is large
- ☐ Where the issues are complex
- ☐ Matter has been in the litigation system for a long time
- ☐ High degree of animosity between the parties
- ☐ Both parties object to referral to mediation
- ☐ One party objects to referral to mediation
- ☐ Other (please specify _____)

26. Are there any comments you would like to make about mediation, particularly in relation to the Supreme Court of Tasmania's program?

[The following questions were asked of some lawyers in order to identify the reasons for the failure of the original research method]

27. Did you receive forms regarding the telephone surveys in relation to particular mediation conferences?

28. Did you send them to your clients? Why not?

2. Mediator interview schedule

This interview is in relation to your general experience of mediation in the Supreme Court of Tasmania.

Background

3. Approximately how many mediation conferences have you participated in over the last 12 months?

1-10 11-20 21-30 31-40 41-50 51-60 61-70 71-80 81-90 91 or more

4. What types of matters do you mediate at the Supreme Court?

Commercial Personal Injuries DeFacto Property TFM
All of above Other.....

5. What types of cases are most appropriate to mediate?

6. What circumstances impact on whether settlement is reached or not?

7. How has court-connected mediation impacted on the civil justice system?

Purpose of mediation

8. What are the goals of mediation?

9. How would a typical mediation work?

10. What advantages does the mediation process have?
11. What disadvantages does the mediation process have?
12. What are we losing by having so many cases go to mediation?
13. What are we gaining from so many cases going to mediation?
14. Who gains most from mediation?

Experiences of mediation

15. Describe your best experience at mediation
16. Describe your worst experience at mediation
17. Is mediation as practised in the Supreme Court of Tasmania substantially different from unassisted lawyer negotiation?
18. Is mediation generally substantially different from unassisted lawyer negotiation?
19. How do you prepare yourself for mediation?
20. Which of the following do you typically do to prepare yourself for mediation?
 - ☐ Review the court file

- ☐ Consider options for settlement
- ☐ Consider strategies
- ☐ Reflect on the personality of the legal practitioners
- ☐ Consider the needs of the parties

21. What training have you undertaken in mediation or other dispute resolution processes? Details.

22. How would you describe the style of your mediation practice at the Supreme Court? Which of the following categories best describes your style?

Facilitative Settlement Evaluative Transformative

Opinion

23. What should remain the same about the Supreme Court's program?

24. What needs to change about the Supreme Court's program?

25. Should a mediator ever advise disputants about the value of a claim, or the likely result if the matter proceeded to trial? In what circumstances?

26. What difference does mediation in the Supreme Court make to the way lawyers practice?

27. What skills and training does a legal practitioner need to participate effectively in mediation? How are those skills developed?

28. Which of the following best describes the legal practitioner's role in court-connected mediation? (You may nominate more than one)

Advocate Advisor Negotiator Other_____

29. Is mediation NOT appropriate in any of the following circumstances?

- ☐ Before litigation has commenced
- ☐ Where liability is in issue
- ☐ Before completion of pleadings
- ☐ Before completion of discovery
- ☐ Before the matter is certified ready for trial
- ☐ After the matter is certified ready for trial
- ☐ After trial has commenced
- ☐ Where there is an imbalance of power between the parties
- ☐ Where the difference between the positions of the parties is large
- ☐ Where the issues are complex
- ☐ Matter has been in the litigation system for a long time
- ☐ High degree of animosity between the parties
- ☐ Both parties object to referral to mediation
- ☐ One party objects to referral to mediation
- ☐ Other (please specify)_____

30. Are there any comments you would like to make about mediation, particularly in relation to the Supreme Court of Tasmania's program?

Appendix C

Mediation Form

Date/...../..... Initials

File No. H
 L/
 B

Case Name:

Conference by Consent / Directed by Judge

Date requested/ordered:

Location: HOBART LAUNCESTON BURNIE DEVONPORT

Duration: hours

Type of Matter:

- | | |
|--|--|
| <input type="checkbox"/> PI/MV | <input type="checkbox"/> TFM |
| <input type="checkbox"/> PI/Industrial | <input type="checkbox"/> Building |
| <input type="checkbox"/> Contract | <input type="checkbox"/> Other (specify) |

.....
☐ De Facto Property

Stage Conference Called:

- ☐ Very early
- ☐ Pleadings closed
- ☐ Judges papers filed
- ☐ Set down for hearing

Solicitors:

Plaintiff/Applicant

Defendant/Respondent

.....

Appendix D

Case Codes

| ACTIONS – Commenced by Writ | Code |
|---|-------------|
| DEBT | |
| Monies due | 102 |
| Taxation | 103 |
| CONTRACTS | |
| Breach of contract | 201 |
| Building | 203 |
| Possession – Rent (Do not confuse with code 708) | 204 |
| Misrepresentation/Fraud | |
| RECOVERY | |
| Motor Accidents (Liabilities & Compensation) Act 1973 | |
| Sections 18 & 28B – Recovery of payments | 251 |
| Workers Rehabilitation & Compensation Act 1988 | |
| Section 134 – Recovery of payments | 252 |
| Other | 254 |
| TORTS | |
| Personal injury – Motor Vehicle | 301 |
| Personal injury – industrial | 302 |
| Personal injury – Fatal Accidents Act 1934 | 309 |
| Personal injury – Occupier’s Liability | 317 |
| Personal injury – Assault | 318 |
| Personal injury – General (ie Not the above) | 303 |
| Professional negligence – Medical | 319 |
| Professional negligence – Legal | 320 |
| Professional negligence – Other | 321 |
| Trespass | 304 |
| Property damage | 305 |
| Defamation/Libel | 322 |
| DECLARATORY RELIEF | |
| Injunction | 502 |
| Declaration | 505 |
| Habeas corpus | 507 |

| | |
|--|-----|
| ADMIRALTY | 601 |
| PROBATE (Includes Applications under s26 & 47 of Wills Act) | 602 |
| OTHER CAUSES OF ACTION – See Supervisor | 620 |
| TRANSERS FROM OTHER JURISDICTIONS | |
| Jurisdiction of Courts (Cross Vesting Act) 1987 | 650 |
| ENFORCEMENT | |
| Service and Execution of Process Act 1992 | |
| Section 105 – Interstate judgments | 660 |
| Sentencing Act 1997 | |
| Section 69 – Compensation Orders | 661 |
| Other | 662 |
| ORIGINATING APPLICATIONS | |
| Adoption Act 1988 | |
| Section 88 – Release of information | 716 |
| Archives Act 1983 | |
| Section 12 – Recovery of State records | 768 |
| Associations Incorporation Act 1964 | |
| Section 33 – Distribution of surplus assets | 780 |
| Bail applications | 736 |
| Bills of Sale Act 1900 | |
| Section 32 – Extend time for registration | 709 |
| Commercial Arbitration Act 1986 | |
| Section 33 – Enforce award | 730 |
| Other | 726 |
| Construction Industry (Long Service) Act 1997 | |
| Sections 6, 8 & 9 – Non payment of contributions | 778 |
| Conveyancing and Law of Property Act 1884 | |
| Section 39 – Contractual questions | 761 |
| Corporations Act 2001 | |
| Sections 459P, 461 – Winding up applications | 705 |
| Other | 714 |
| Crime (Confiscation of Profits Act 1993) | |
| Section 11, 26 – Forfeiture/Restraining orders | 744 |
| Criminal Code 1924 | |
| Section 420 – Leave to file an indictment | 757 |
| Criminal Injuries Compensation Act 1976 | |
| Section 25 – Forfeiture order | 759 |
| Evidence on Commission Act 2001 | |
| Section 4 – Obtain evidence in Tasmania | 764 |
| Guardianship & Custody of Infants Act 1934 | |
| Section 10 – Custody / access orders | 702 |
| Industrial Relations Act 1984 | |
| Section 72 – Application for order nisi | 747 |

| | |
|--|-----|
| Judicial Review Act 2000 | |
| Sections 17, 18, 19 – Order of review | 707 |
| Land Acquisitions Act 1993 | |
| Sections 38, 44 – Determination of compensation | 748 |
| Land Titles Act 1980 | |
| Section 146 – Possession | 708 |
| Sections 135, 136 – Caveats | 740 |
| Other | 776 |
| Land Valuation Act 1971 | |
| Section 28 – Objection to valuation | 723 |
| Legal Profession Act 1993 | |
| Sections 23, 24, 25, 27, 28 – Admissions to the bar | 743 |
| Section 135 – Taxation of bills of costs | 746 |
| Other | 749 |
| Limitation Act 1974 | |
| Section 5 – Extend time | 745 |
| Magistrates Court (Civil Division Act) 1992 | |
| Section 30 – Transfer of proceedings to Supreme Court | 781 |
| Motor Accidents (Liabilities & Compensation) Act 1973 | |
| Section 16 – Extend time | 721 |
| Mutual Recognition Act 1992 (Cth) | |
| Section 19 – Registration for Admissions to the bar | 741 |
| Notaries Public Act 1990 | |
| Section 5 – Appointment of Notaries Public | 739 |
| Ombudsman Act 1978 | |
| Section 32 – Question of jurisdiction | 777 |
| Partition Act 1869 | |
| Sections 3, 4 – Sale of property | 742 |
| Partnership Act 1891 | |
| Sections 40, 44 – Dissolution of partnership | 782 |
| Prisoners (Removal of Civil Disabilities) Act 1991 | |
| Sections 4 & 5 – Leave to sue / appoint administrator | 751 |
| Probate (Administration & Probate Act 1935 and Rules) | |
| E.g. Rule 20A – Admit will to proof | 706 |
| Proceeds of Crime Act 1987 (Cth) | |
| Sections 30 & 45 – Forfeiture / restraining orders | 738 |
| Public Trustee Act 1930 | |
| Section 32 and ors – Orders as to property | 725 |
| Relationships Act 2003 | |
| Sections 36, 66 – Adjustment, maintenance or declaration | 783 |
| Retirement Benefits Act 1993 and Regulations | |
| e.g. Regulation 106 – Declaration | 784 |
| Service and Execution of Process Act 1992 | |
| Section 57 – Leave to serve subpoena | 772 |
| Settled Land Act 1884 | |
| Section 35 – Appointment of trustees | 775 |
| Shipping Registration Act 1981 (Cth) | |
| Section 47 – Caveats | 758 |
| Stamp Duties Act 1931 | |
| Section 21 – Objection to assessment | 718 |

| | |
|--|-----|
| Status of Children's Act 1974 | |
| Section 10 – Declaration of parentage | 752 |
| Supreme Court Rules | |
| Rule 695 – Stated case | 754 |
| Other e.g. Rule 299 – Approval of compromise | 756 |
| Taxation Administration Act 1997 | |
| Section 89 – Taxpayer's objection | 767 |
| Testator's Family Maintenance Act 1912 | |
| Section 3 – Claim for maintenance | 712 |
| Trustee Act 1898 | |
| Sections 32, 48 – Appoint new trustees/payments into Court | 766 |
| Wills Act 1992 – See also code 602 | |
| Sections 45, 46 – Gifts to attesting witness | 770 |
| Workers Rehabilitation & Compensation Act 1988 | |
| Section 135 – Extend time | 760 |

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MAGISTRATES COURT

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| Notice to Review – Petty Sessions | 811 |
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| Medical | 823 |
| Legal Profession | 824 |

OTHER

| | |
|---------------------------------------|-----|
| e.g. Appeals from Boards and Councils | 830 |
|---------------------------------------|-----|

FULL COURT 901

COURT OF CRIMINAL APPEAL 951

CODES TO BE DELETED – NO MATTERS

| | | | | | |
|-----|-----|-----|-----|-----|-----|
| 307 | 313 | 314 | 602 | 663 | 664 |
| 785 | 786 | 787 | 803 | | |

CODE IS UNKNOWN (until determined by a supervisor)999

CODES NOT TO BE USED

(Some have new codes or the Acts under which proceedings commenced have been repealed)

| | |
|---|-----|
| Goods sold and delivered | 101 |
| Recovery of land | 202 |
| Sale of property & distribution of proceeds | 205 |
| Professional negligence | 306 |

| | |
|---|-----|
| Damages | 308 |
| Specific performance of a deed | 310 |
| Tax Administration Act 1953 | 311 |
| Interstate judgments | 312 |
| | 604 |
| Interstate subpoenas – leave to issue | 722 |
| Medical Act 1959 | 315 |
| Fraud – Change to 206 | 316 |
| Workers Compensation Act 1927 | 351 |
| Workers Compensation | 719 |
| Workers and Rehabilitation and Compensation Act | 753 |
| Damages – Property | 401 |
| Defamation/libel | 501 |
| Certiorari | 503 |
| Mandamus | 504 |
| Prohibition | 508 |
| Assault | 506 |
| Legal Practitioners Act 1959 | 703 |
| Tax costs | 715 |
| Companies Act | 704 |
| Certificates of Disability | 710 |
| Mental Health Act 1963 | 711 |
| Extend time | 713 |
| Lands Resumption Act 1957 | 717 |
| Subpoenas – set aside | 724 |
| Trustees Bank Act 1985 | 727 |
| Motor Accidents (L&C) 1973 | 728 |
| Miscellaneous Applications | 729 |
| Infants compromise RSC 1965 – O24 & O65 | 731 |
| Corporations Law | 732 |
| Foreign Tribunal Evidence Act 1856 | 733 |
| Supreme Court Rules 1965 | |
| O51 | 734 |
| O24 & O65 | 763 |
| Registration of Births, Deaths and Marriages Act 1895 | 735 |
| Powers of Attorney Act 1934 | 737 |
| Trade Practices Act | 750 |
| Child Support Act 1988 | 755 |
| Law Society Act 1962 | 762 |
| Sex Discrimination Act 1934 | 765 |
| Tortfeasors & Contributory Negligence Act 1954 | 769 |
| Coroners Act 1957 | 771 |
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